San Diego International Law Journal

Volume 8
Issue 1 *Fall 2006*

Article 5

11-1-2006

The International Tribunal for the Law of the Sea and the Possibility of Judicial Settlement of Disputes Involving the Fishing Entity of Taiwan - Taking CCSBT as an Example

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I. INTRODUCTION

Article 20, Paragraph 2, of the Statute of the International Tribunal for the Law of the Sea (hereafter ITLOS Statute) reads: "[t]he Tribunal shall be open *to entities other than State Parties* . . . in any case submitted pursuant to *any other agreement* conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."[1] Article 21 of the same Statute provides that "[t]he jurisdiction of the Tribunal comprises all

1. Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea) art. 20(2), Dec. 10, 1982, 1833 U.N.T.S. 397, *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclose.pdf (last visited Sept. 4, 2006) (emphasis added).

disputes and all applications submitted to it in accordance with this Convention [the 1982 United Nations Convention on the Law of the Sea, hereafter UNCLOS][2] and all matters specifically provided for in *any other agreement* which confers jurisdiction on the Tribunal."[3] In addition, under Article 22, "[i]f all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal."[4]

Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (hereafter the SBT Convention)[5], which was adopted on May 10, 1993 and became effective on May 5, 1994, states that "[i]f any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention [the SBT Convention], those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice."[6] From April 18-21, 2001 the Commission for the Conservation of Southern Bluefin Tuna (hereafter CCSBT) held its Seventh Annual Meeting, and during the meeting adopted the Resolution to Establish an Extended Commission and An Extended Scientific Committee (hereafter the April 2001 CCSBT Resolution).[7] According to paragraph 6 of this Resolution, any entity or fishing entity, a vessel flagged which has caught Southern Bluefin Tuna (SBT) at any time in the previous three calendar years,

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2. *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 391. Division for Ocean Affairs and the Law of the Sea, Oceans and Law of the Sea: Chronological lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at November 2, 2006, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (152 states and entities are parties to the UNCLOS).

3. ITLOS, *supra* note 1, art. 21 (emphasis added).

4. ITLOS, *supra* note 1, art. 22.

5. *See generally* Convention for the Conservation of the Southern Bluefin Tuna, May 10, 1993, 1819 U.N.T.S. 359 (*entry into force* May 20, 1994) [hereinafter SBT Convention], *available at* http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf.

6. *Id.* art. 16.

7. Commission for the Conservation of Southern Bluefin Tuna, *Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna, adopted* April 18-21, 2001 (*revised* Oct. 7-10, 2003), http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf.

may express its willingness to the Executive Secretary of the CCSBT to become a member of the Extended Commission. The Executive Secretary of the Commission, on behalf of the CCSBT, will conduct an Exchange of Letters with the representative of such entity or fishing entity to this effect.[8]

From October 15-18, 2001, during the 8th Annual Meeting of the CCSBT, the Taiwanese representative expressed its willingness to become a member of the Extended Commission, and agreed to accept an initial allocation of SBT at 1,140 metric tons (mt).[9] On December 28, 2001, the Executive Secretary of the CCSBT, Brian Macdonald, sent a letter to the Administrator of the Fisheries Administration, Council of Agriculture, Mr. Hu Sing-hwa, on the basis of the April 2001 CCSBT Resolution requesting the Fishing Entity of Taiwan to apply to become a member of the Extended Commission.[10] On December 31 of that same year, Administrator Hu Sing-hwa sent a letter back expressing his acceptance of this invitation.[11] On January 1, 2002, following the procedure of the Exchange of Letters, the Executive Secretary sent notification that the case of Taiwan's application had already been accepted, and requested that Taiwan complete relevant domestic legal procedures.[12] On August 30, 2002, Taiwan formally became a member of the Extended Commission of the CCSBT.

Although Taiwan is unable to become a contracting party to the SBT Convention due to political considerations, it qualified as a member of the Extended Commission of the CCSBT through the said Exchange of Letters. By becoming a member of this regional fishery management organization, Taiwan enjoys rights and obligations "virtually" equal to those of other CCSBT members. These rights and responsibilities include undergoing negotiation, conciliation, arbitration or other peaceful means to resolve possible fisheries disputes arising from the interpretation and implementation of conservation and management measures of the SBT Convention. In accordance with paragraph 2 of the April 2001 CCSBT Resolution, "[a]ny dispute concerning the interpretation or implementation

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8. *Id.* para. 6.

9. See Japanese Ministry of Agriculture, Forestry and Fisheries, MAFF Update No. 430 (Nov. 2, 2001), http://www.maff.go.jp/mud/430.html (last visited Sept. 4, 2006).

10. Letter from Brian Macdonald, Executive Secretary, CCSBT, to Mr. Hu Sing-hwa, Administrator of the Fisheries Administration, Council of Agriculture (Dec. 28, 2001) [hereinafter Dec. 28, 2002 Letter] (on file with author).

11. Letter from Mr. Hu Sing-hwa, Administrator of the Fisheries Administration, Council of Agriculture, to Brian Macdonald, Executive Secretary, CCSBT (Dec. 31, 2001) [hereinafter Dec. 31, 2001 Letter] (on file with author).

12. Letter from Brian Macdonald, Executive Secretary, CCSBT, to Mr. Hu Sing-hwa, Administrator of the Fisheries Administration, Council of Agriculture (Jan. 8, 2001) [hereinafter Jan. 8, 2002 Letter] (on file with author).

of this Resolution, including the articles of the [SBT] Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute."[13]

On the basis of the aforementioned legal regulations, once a fishery dispute arises in the future between Taiwan and another CCSBT member that cannot be resolved through negotiation, or other methods of non-judicial or para-judicial third party dispute settlement, will it be possible for the dispute to be referred to the International Tribunal for the Law of the Sea (hereafter ITLOS) for judicial settlement? If so, according to which legal grounds? If not, what is the reason?

The main purpose of this paper is to assess the possibility of judicial settlement of fishery disputes involving the fishing entity of Taiwan and examine the legal questions regarding jurisdiction over the disputes. This analysis is based on the articles related to dispute settlement that are provided in the SBT Convention, the ITLOS Statute and the international law of the sea[14] and the judicial practice of the ITLOS and other relevant arbitration courts in *the Southern Bluefin Tuna case.*[15] Following this introductory section, Section II describes the establishment of the CCSBT and the selection and application of the methods of dispute settlement provided in the SBT Convention. Section III examines the disputes between the members of CCSBT and other fishing entities, in particular Taiwan, over the agreed dispute settlement mechanisms that are based on the interpretation and application of the relevant conventions, agreements, resolutions, exchange of letters, or other fisheries conservation and management measures. Section IV explains the legal foundation for

13. April 2001 CCSBT Resolution, *supra* note 7.

14. *See generally* UNCLOS, *supra* note 2; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, Temp. State Dep't No. 104-24 [hereinafter the UNFSA], *available at* http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm (last visited Sept. 4, 2006); Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 33 I.L.M. 968 (hereafter HSCA) *available at* http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130E00.HTM. *See* Oceans and Law of the Sea: Chronological lists of Ratifications *supra* note 2 (As of November 2, 2006, the UNCLO had 152 contracting parties, the UNFSA had 61 contracting parties). As of March 7, 2006, 33 countries and the European Community had deposited their instruments of acceptance of the HSCA. United Nations, FAO, http://www.fao.org/legal/treaties/012s-e.htm (ratification of the HSCA).

15. *Infra* notes 62 & 63.

the jurisdiction of ITLOS over relevant fishery disputes referred to it for judgment. Section V examines the issue of whether "entities other than State parties" can become parties to a case that is referred to ITLOS. In Section VI, the judicial practice exercised in the *Southern Bluefin Tuna case* is cited to help discuss the issue concerning whether ITLOS has jurisdiction over the SBT case and thus can render final ruling over the dispute in the case. Section VII examines how a fishing dispute occurring between Taiwan and CCSBT members should be resolved; in particular, it addresses the possibility for Taiwan to refer the disputes to ITLOS for judgment, and discusses the question of whether ITLOS can exercise jurisdiction over a fisheries dispute involving Taiwan as a fishing entity. Lastly, Section VIII concludes the paper.

II. CCSBT MEMBER STATES AND THE SELECTION AND APPLICATION OF THE METHODS OF DISPUTE RESOLUTION

The CCSBT is a regional fishery management organization established in May 1994 by Japan, Australia and New Zealand with the objective to ensure, through appropriate management, the conservation and optimum utilization of the global SBT fishery. The CCSBT is currently the only regional fishery management organization established for the purpose of conserving one single fish stock, namely, SBT. After 1961, when the worldwide SBT total catch reached a historic height of 81,605 metric tonnes (mt), subsequent catches then dropped off sharply, showing that resources were already depleted. Faced with a rapidly decreasing catch rate, the fishing nations concerned (Australia, Japan and New Zealand) had no choice but to reach a consensus on settling a total allowable catch of SBT and began to apply strict quotas to their fishing fleets in 1985 as a management and conservation measure to enable the SBT stocks to rebuild. The objective of the CCSBT established in 1994 is to return fishing stocks to 1980 levels by the year 2020 through limiting catches. In pursuit of the Commission's objective, the CCSBT performs a number of functions, such as strengthening assessment of stocks by carrying out research work, monitoring the SBT stocks, setting catch allocation, reaching cooperative arrangements with non-member fishing States, monitoring other SBT fishing related activities, and adopting effective preventive measures. Long before the CCSBT was established, the three member states of Australia, New Zealand and Japan had already adopted measures for limiting catches, with a total allowable catch (TAC) from 1989 on maintained at approximately 11,750 mt.[16]

16. *See* Commission for the Conservation of Southern Bluefin Tuna, About the Commission, http://www.ccsbt.org/docs/about_s.html (last visited Sept. 4, 2006).

Due to SBT being caught by Taiwanese fishing boats in its traditional fishing grounds in the Atlantic, Indian and the Atlantic Oceans before the establishment of the CCSBT, and with these fish catches being exported mainly to Japan, the CCSBT requested Taiwanese representatives to nominally participate as observers in its conferences every year since its establishment. On the other hand, for the purpose of protecting its operational rights and interests, every year Taiwan has dispatched representatives to participate in the conferences as observers, and to cooperate with the CCSBT by adopting the requested conservation and management measures. As stated in Section I, starting from August 2002, Taiwan became a member of the Extended Commission of the CCSBT, enjoying "virtually" the same rights and responsibilities as other member States of the organization. As for the distribution of CCSBT fishing quotas, Taiwan, being a member of the CCSBT Extended Commission, has the same allotted quota as South Korea, a CCSBT member. As of January 2005, the CCSBT had four member States (Australia, New Zealand, Japan and South Korea), five Extended Commission members (Australia, New Zealand, Japan, South Korea and Taiwan), and one cooperating non-member, the Philippines. The total CCSBT allowable catch for SBT set for 2004-2005 was 14,930 mt, including 6,065 mt allotted to member State Japan, 5,265 mt allotted to member State Australia, 1,140 mt allotted to member State South Korea, 1,140 mt allotted to Extended Commission member Taiwan, 420 mt allotted to member State New Zealand and 50 mt allotted to the Philippines as a cooperating non-member. Indonesia and South Africa will be allotted a quota of 800 mt and 45 mt of SBT respectively if their application for becoming cooperating non-members is approved by the CCSBT.[17]

Of the five members of the CCSBT (including members and Extended Commission members), Australia ratified and became a Party to the UNCLOS in 1994. New Zealand, Japan and South Korea all became Parties to the UNCLOS in 1996. Taiwan is unable to sign, accede to, or ratify the 1982 UNCLOS due to political factors, and therefore is not a contracting party to this Convention. Nevertheless, the Taiwanese government clearly expressed that, based on the principles of fairness, reciprocity and equality, Taiwan would voluntarily abide by the relevant

17. *See* Commission for the Conservation of Southern Bluefin Tuna, Management of SBT: Catch Levels, http://www.ccsbt.org/docs/management.html (last visited Sept. 4, 2006).

regulations of the UNCLOS. Of the five members of the CCSBT, Australia became a party to the UNFSA in 1999 and New Zealand in 2001, but South Korea, Japan and Taiwan are not parties to the same agreement. Japan ratified the HSCA in 2000, South Korea in 2003, New Zealand in 2005, and Australia in 1996. (See Table 1) Thus, the members of the CCSBT, in addition to being bound by the articles related to dispute settlement provided in the SBT Convention, are also obligated to abide by the relevant dispute resolution procedures stipulated in Part XV of the UNCLOS and Part VIII of the UNFSA. In addition, as Australia, New Zealand, Japan and South Korea are all parties to the HSCA, they must also abide by the regulations regarding dispute settlement provided in Article 9 of that agreement.

Under Article 287(1) of the UNCLOS:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice (c) an arbitral tribunal in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[18]

Amongst the CCBST member States, only Australia has made this choice. On March 21, 2002, Australia made a declaration, according to the regulations specified in Article 287 of the UNCLOS, that for the settlement of disputes concerning the interpretation or application of the Convention, they would choose the methods of ITLOS and the International Court of Justice (hereafter ICJ).[19] Japan, New Zealand and South Korea have not made declarations concerning dispute resolution methods. Thus, according to the regulations of Article 287(3) of the 1982 UNCLOS, arbitration methods for dispute settlement should be adopted in accordance with Annex VII of this Convention.[20] But Article 287(4) of the UNCLOS has another regulation which reads, "If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree."[21] Article 287, paragraph 5, of the same Convention also states: "[i]f the parties to a dispute have not

18. UNCLOS, *supra* note 2, art. 287, para. 1.

19. Division for Ocean Affairs and the Law of the Sea, Oceans and Law of the Sea: Declarations and Statement (August 29, 2006), http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

20. *See* UNCLOS, *supra* note 2, art. 287, para. 3 ("A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.").

21. UNCLOS, *supra* note 2, art. 287, para. 4.

accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree."[22]

TABLE 1: CCSBT MEMBERS' RATIFICATION OF 1982 UNCLOS, 1995 UNFSA, 1993 HSCA, AND 1993 SBT CONVENTION

		1982 UNCLOS	**1995 UNFSA**	**1993 HSCA**	**1993 SBT Convention**
1.	Australia	5 Oct. 1994	23 Dec. 1999	24 June 1996	10 May 1993 Founding member
2.	Japan	20 June 1996	7 Aug. 2006	20 June 2000	10 May 1993 Founding member
3.	New Zealand	19 July 1996	18 Apr. 2001	14 July 2005	10 May 1993 Founding member
4.	South Korea	29 Jan. 1996	Not yet ratified	24 Apr. 2003	Became member 17 Oct. 2001
5.	Taiwan	Unable to ratify	Unable to ratify	Unable to ratify	Became Extended Commission member 30 Aug. 2002
6.	Phillippines	8 May 1984	Not yet ratified	Not yet ratified	Became cooperating non-member 2 Aug. 2004

Tabulated by author. Notes: The 1982 UNCLOS became effective on November 16, 1994; the 1994 UNFSA became effective on December 11, 2001; The 1993 HSCA became effective on April 24, 2003; and the 1993 SBT Convention became effective on May 20, 1994.

As Australia, Japan, and New Zealand are Parties to the UNFSA, they are obliged to go through negotiation, inquiry, mediation, conciliation,

22. UNCLOS, *supra* note 2, art. 287, para. 5.

arbitration, judicial settlement or other peaceful means of their own choosing for the settlement of disputes according to the regulations of Article 27 of this Agreement. In addition, Article 30(1) of the UNFSA states that the regulations of Part XV of the UNCLOS relevant to dispute settlement apply to any disputes regarding the interpretation or implementation of the Agreement between contracting parties to the UNFSA (Australia and New Zealand), whether or not these countries are parties to the UNCLOS. Article 30(2) of the UNFSA states that the regulations for dispute settlement in Part XV of the UNCLOS apply to any disputes arising between parties to the UNFSA (Australia and New Zealand) related to the interpretation and implementation of a regional, sub-regional or global fisheries agreements related to straddling fish stocks or highly migratory fish stocks to which they are parties including any dispute concerning the conservation and management of such stocks and no matter whether these states are contracting parties to the UNCLOS. Due to the fact that Australia made the declaration in accordance with Article 287 of the UNCLOS regarding the selection of methods of dispute settlement in 2002, it is obligated to use ITLOS or ICJ to resolve disputes in accordance with Article 30, paragraph 3 of the UNFSA, unless Australia, when signing, ratifying, or acceding to the UNFSA, or at any time thereafter, accepts another procedure provided in Article 287 of the UNCLOS (that is, arbitration or special arbitration) to resolve the dispute regulated in Part VIII of the UNFSA. Lastly, Article 30, paragraph 5, of the UNFSA provides that

> [a]ny court or tribunal to which a dispute has been submitted under this part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

As Australia, New Zealand, Japan and South Korea are parties to the HSCA, under Article 9 of this agreement, they are also obligated to seek consultations with other parties on any dispute with regard to the interpretation or implementation of the provisions of the HSCA with a view to reaching a mutually satisfactory solution. In the event that the dispute is not resolved through these consultations within a reasonable period of time, the parties in question shall consult amongst themselves as soon as possible with a view to having the dispute settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. Any dispute not so resolved, with

the consent of all parties concerned, should be referred to the ICJ or ITLOS for judicial settlement or proceed to arbitration.[23]

III. THE SELECTION OF MEANS OF SETTLEMENT IN THE EVENT THAT A LEGAL DISPUTE OCCURS BETWEEN CCSBT MEMBERS AND TAIWAN

While Taiwan is excluded from signing, ratifying or acceding to the UNCLOS, the UNFSA, the HSCA, and the SBT Convention because of the complex political issues and its unique status under international law, the entry into force of these conventions and agreements have legal utility for the interpretation or implementation of Taiwan's participation in sub-regional, regional or global fisheries conservation and management organizations. In particular, Article 1, paragraph 3 of the UNFSA provides that "[t]his Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas." Article 8, paragraph 3 of the same Agreement reads:

> . . . States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement . . . . States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such states from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.[24]

Under Article 10 of the UNFSA, "[i]n fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall: . . . (i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated."[25] In addition, Article 11 of the same agreement also states that

> [i]n determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States shall take into account, *inter alia*, . . . (b) the respective interests, fishing patterns and fishing practices of new and existing members of participants; (c) the respective contributions of new and existing members or participants to

23. HSCA, *supra* note 14, art. 9, para. 3.
24. UNFSA, *supra* note 14, art. 8, para. 3.
25. UNFSA, *supra* note 14, art. 10.

conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks . . . ."[26]

With regard to the disputes arising from the interpretation and application of the SBT Convention, the Exchange of Letters, and the resolutions adopted by the CCSBT concerning the conservation and management of SBT, would the procedures provided within Part VIII of the UNFSA concerning dispute settlement be applied to Taiwan and other CCSBT member states who are also contracting parties to the UNFSA (namely, Japan, Australia and New Zealand) in accordance with Article 1(3)[27] of the same agreement? Moreover, with regards to the CCSBT, once disputes arise related to the interpretation and implementation of the April 2001 CCSBT Resolution (including the relevant provisions clearly mentioned in the SBT Convention, or the Exchange of Letters referred to in the text of paragraph 6 of the Resolution), Taiwan and the member States of the CCSBT (Australia, New Zealand, Japan and South Korea) should go through "negotiation, inquiry, mediation, conciliation, arbitration or any other peaceful means" of their own choice for dispute resolution.[28] It should be noted that here is omission of text referring to judicial settlement in the second paragraph of the April 2001 CCSBT Resolution. Does this imply that once a dispute occurs between Taiwan and CCSBT member States regarding the interpretation or application of the April 2001 CCSBT, they are unable to send the dispute to the ITLOS for judicial settlement?

On April 20, 2001, at the 7th Annual Meeting of CCSBT, the Resolution to Establish an Extended Commission and Extended Scientific Committee was adopted in accordance with the regulations provided in Article 8(3)(b) of the SBT Convention.[29] Under Article 8(7), the contracting parties to the SBT Convention (Australia, New Zealand, Japan and South Korea) are bound by this resolution.[30] However when the resolution was adopted, Japan put forward the following statement: "[i]n agreeing to the resolution, Japan advised that in relation to the Government of Japan its agreement was on the basis of interpreting the reference to the Exchange of Letters as not meaning an exchange of diplomatic documents."[31] The

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26. UNFSA, *supra* note 14, art. 11.

27. *See* UNFSA, *supra* note 14, art. 1, para. 3 (stating "[t]his Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.").

28. April 2001 CCSBT Resolution, *supra* note 7, para. 2.

29. *See* SBT Convention, *supra* note 5, art. 8, para. 3 (stating "For the conservation, management and optimum utilisation of southern bluefin tuna: (b) the Commission may, if necessary, decide upon other additional measures.").

30. *See* SBT Convention, *supra* note 5, art. 8, para. 7 (stating "All measures decided upon under paragraph 3 above shall be binding on the Parties.").

31. *See* Commission for the Conservation of Southern Bluefin Tuna, Report of the Seventh Annual Meeting of the Commission, Sydney, Australia, April 18-21 2001, para. 23, http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_7/report_of_ccsbt7.pdf.

other member states of the CCSBT did not make these kinds of statements.

After the adoption of the April 2001 CCSBT Resolution, the Taiwan representative to the CCSBT 8th Annual Meeting expressed the intention of Taiwan to apply for membership of the Extended Commission of the CCSBT, and accepted the proposed SBT fishing quota of 1,140 mt.[32] On December 28, 2001, on the basis of the text of Paragraph 6 of the Resolution,[33] the Executive Secretary of the CCSBT, Brian Macdonald, sent a letter to the Administrator of Taiwan's Fisheries Administration, Mr. Hu Sing-hwa, inviting Taiwan to apply to become a member of the Extended Commission of the CCSBT as the "Fishing Entity of Taiwan."[34] The Exchange of Letters between the CCSBT Executive Secretary, representing the CCSBT, and Taiwan completed the procedure for admission.

It is worth emphasizing that the letter of invitation of the CCSBT Executive Secretary and the Exchange of Letters between the CCSBT and Taiwan, both refer to the rights and responsibilities of Taiwan as a member of the Extended Commission. The letter of invitation of the CCSBT Executive Secretary states:

> . . . Provisions of the [SBT] Convention related to the Commission and Scientific Committee (Articles 6 to 9, except for 6.9 and 6.10) apply *mutatis mutandis* to the Extended Commission and to the Extended Scientific Committee. All Members of the Extended Commission that are not Members of the Commission are entitled to participate fully in all subsidiary working groups and other bodies involved in cooperative work pursuant to the [SBT] Convention. . . .
>
> I hereby assure you that all Members of the Extended Commission that are not Members of the Commission are entitled to enjoy the same rights and obligations with other Members of the Extended Commission in decision-making of the Extended Commission related to work under the [SBT] Convention. I draw to your attention provisions of the Resolution that provide a strong practical assurance of the rights of all Members of the Extended Commission in decision-making. In particular, paragraph 4 of the Resolution provides that decisions reported from the Extended Commission to the Commission will become decisions of the Commission unless the Commission decides to the contrary.

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32. *See* MAFF Update, *supra* note 9.

33. *See* April 2001 CCSBT Resolution, *supra* note 7, para. 6 (stating "Any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, may express their willingness to the Executive Secretary of the Commission to become a member of the Executive Commission.").

34. Dec. 28, 2001 Letter, *supra* note 10.

> Further, any decision of the Commission that affects the operations of the Extended Commission or the rights, obligations or status of any individual Member within the Extended Commission should not be taken without prior due deliberation of that issue by the Extended Commission.
>
> In accordance with the Rules of Procedure of the Commission and the Extended Commission, all decisions must be taken by a unanimous vote of Members present. It would be contrary to an important principle of international law, i.e. "good faith", if a Member of the Extended Commission that took part in a unanimous decision by the Extended Commission subsequently voted to the contrary in decision-making by the Commission. It follows that Taiwan would be bound only by the decisions of the Extended Commission, to which we would require Taiwan's firm commitment.[35]

On December 31, 2001, Administrator of Taiwan's Fisheries Administration replied by letter that he accepted this invitation. However, it was expressed in his replying letter that, on the basis of the application of Article 20, *mutatis mutandis,* of the SBT Convention, Taiwan would preserve the right to withdraw from the CCSBT Extended Commission by sending a written notice to the Executive Secretary of the Commission one year previously.[36] On January 8, 2002, following the procedure of the Exchange of Letters, the Executive Secretary of the CCSBT sent a letter informing Taiwan that the application of the membership of the CCSBT Extended Commission had already been approved, and requested Taiwan to complete relevant domestic legal procedures.[37] The agreement reached in the letter of invitation of the Executive Secretary of the CCSBT and the Exchange of Letters between Taiwan and the CCSBT confirms that Taiwan and other CCSBT Extended Commission members enjoy the same rights and responsibilities. After completing the relevant domestic legal procedures, on August 30, 2002, Taiwan formally became a member of the CCSBT Extended Commission and Extended Scientific Committee. According to paragraph 2 of the April 2001 CCSBT Resolution, any dispute that arises concerning the interpretation or implementation of this Resolution (including the relevant provisions of the SBT Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6 of the Resolution) between Taiwan and CCSBT member States (Australia, New Zealand, Japan and South Korea) shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.[38]

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35. *Id.*
36. Dec. 31, 2001 Letter, *supra* note 11.
37. Jan. 8, 2002 Letter, *supra* note 12.
38. See April 2001 CCSBT Resolution, *supra* note 7, para. 2 ("Any dispute concerning the interpretation of implementation of this Resolution, including the articles of the Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.").

Despite this, as mentioned previously, paragraph 2 of the April 2001 CCSBT Resolution sedulously excludes judicial resolution as a means of dispute settlement. However can the text of "or other peaceful means of resolution agreed by the parties to the dispute" contained in paragraph 2 of the April 2001 CCSBT Resolution be interpreted as including sending the dispute to ITLOS for judicial settlement? This issue will be addressed in more detail in Section VII.

IV. THE JURISDICTION OF ITLOS OVER FISHING DISPUTES

ITLOS was established in August 1996 according to the relevant provisions of the UNCLOS after the election of 21 judges, as a new international judicial institution in the Free and Hanseatic City of Hamburg, Germany.[39] ITLOS is also one of the judicial bodies referred to in Part XV of the UNCLOS that can settle disputes related to the interpretation and application of this Convention.[40]

From the 1997 trial of the *M/V "Saiga* case" until the present, ITLOS has tried 13 cases in total, respectively *M/V* "Saiga" Case (No. 1), *M/V "Saiga"* Case (No. 2), *Southern Bluefin Tuna* Case (No. 3 and 4), the "*Camouco*" case (No. 5), the "*Monte Confurco*" case (No. 6), the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (No. 7), the "*Grand Prince*" Case (No. 8), the "*Chaisiri Reefer 2*" Case (No. 9), *The MOX Plant* Case (No. 10), The "*Volga*" Case (Russian Federation v. Australia) (No. 11), *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore) (No. 12), and the "*Juno Trader*" Case (Saint Vincent and the Grenadines v. Guinea Bissau) (No. 13).[41]

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39. For general information on the ITLOS, visit the Tribunal's website at: http://www.itlos.org/start2_en.html (last visited Oct. 15, 2006).

40. *See* UNCLOS, *supra* note 2, art. 287, para. 1 states:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

41. *See* International Tribunal for the Law of the Sea, Proceedings and Judgments—List of Cases, http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en (last visited Sept. 5, 2006).

From the thirteen cases mentioned above, apart from number 7 (the Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean) which is still not resolved, ITLOS has made a ruling or issued an order on the other twelve cases. According to Article 292 of the 1982 UNCLOS, ITLOS has made all judgments on case numbers 1, 5, 6, 8, 9, 11, and 13 correlated to jurisdiction over prompt release of vessels and crews.[42] Judgments on cases number 3, 4, 10, and 12 were made according to Article 290 of the UNCLOS, where any provisional measures may be prescribed by the court if it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.[43] These judicial practices demonstrate that ITLOS

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42. UNCLOS, *supra* note 2, art. 292 states:
(1)Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree. (2) The application for release may be made only by or on behalf of the flag State of the vessel. (3) The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time. (4) Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

Id.

43. UNCLOS, *supra* note 2, art. 290 states:
(1) If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision; (2) Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist; (3) Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard; (4) The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures; (5) Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Sea-Bed Disputes Chamber, may prescribe, modify or revoke provisional measures in

indeed plays an important role in international fishery disputes, especially with regard to judicial settlement of fishery disputes involving the speedy release of vessels and crews.

The foundation of the legal jurisdiction enjoyed by ITLOS in international fishery disputes includes: (1) the articles relevant to dispute settlement of the UNCLOS; (2) the articles relevant to dispute settlement of the UNFSA; (3) when parties to a multilateral treaty explicitly agree to refer disputes to ITLOS for settlement; (4) when disputing States, whether they are parties to the UNCLOS, the UNFSA, or the HFCA, conclude an agreement (usually called *compromis* or special agreement) to refer disputes to ITLOS for settlement; (5) Part XI of the UNCLOS related to disputes arising over deep seabed mining activities; and (6) other matters to which ITLOS has jurisdiction.[44] This paper does not include discussion of the court's jurisdiction over disputes arising from deep seabed activities or other advisory jurisdiction, since it is related less to the international fishery disputes. A more detailed examination of items 1-4 that form the foundation of the legal jurisdiction enjoyed by ITLOS follows:

A. Jurisdiction of ITLOS Under Relevant Articles of the UNCLOS

According to the choice of methods for dispute settlement provided in Article 287 of the UNCLOS, if a state when signing, ratifying or acceding to this Convention chooses ITLOS to resolve disputes related to the interpretation or implementation of articles of the UNCLOS, then ITLOS has jurisdiction over the dispute. Under Article 288 of the same Convention, ITLOS also has jurisdiction over any disputes, referred to it in accordance with Part XV of the UNCLOS, over the interpretation and application of the provisions contained in the Convention, and any disputes which are referred to the Tribunal according to the international agreements which are relevant to the purpose of the UNCLOS, over the

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> accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4; (6) The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Id.

44. *See generally* GUDMUNDUR EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA at 111-44 (2000) (stating ITLOS jurisdiction includes contentious jurisdiction and advisory jurisdiction).

interpretation and application of the agreements concerned. As to the question concerning whether ITLOS has jurisdiction over a dispute, it should be decided by a ruling from ITLOS. For example, Australia and Canada have made a declaration choosing ITLOS as one of the methods of judicial settlement to be used when disputes occur related to the interpretation or application of the UNCLOS. However, it is important to note, even though the contracting parties to the UNCLOS have chosen ITLOS as one of the methods of judicial settlement to be used when disputes occur related to the interpretation or application of the UNCLOS, the jurisdiction of ITLOS is limited because, under Article 297 or Article 298 of the UNCLOS, the parties concerned have the right to request the disputes related to fisheries, maritime boundary delimitation, and military related activities to be excluded from the jurisdiction of ITLOS. Article 297 (3)(a) of UNCLOS states that:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[45]

According to Article 290(1) of the UNCLOS,

> [if] a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction . . . the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

In addition, paragraph 5 of the same Article states that

> [p]ending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

According to this, ITLOS also has jurisdiction when parties to the UNCLOS request that provisional measures be prescribed.

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45. UNCLOS, *supra* note 2, art. 297, para. 3(a).

ITLOS also has jurisdiction over disputes arising related to the interpretation of regulations regarding the prompt release of vessels and crews on the basis of Article 292(1) of the UNCLOS. This Article states:

> Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

B. Jurisdiction of ITLOS Under Part VIII of the UNFSA

The settlement of disputes referred to in Part VIII of the UNFSA is very relevant to the dispute settlement procedures provided in Part XV of the UNCLOS, mainly because under Article 30(1) of the UNFSA, the dispute over the interpretation and application of the Agreement is to be settled by using the same legal regime for dispute settlement that is provided in the UNCLOS. Accordingly, unless the parties to the UNFSA have already reached agreement on another means of dispute settlement in accordance with Article 280 of the UNCLOS,[46] for disputes related to the interpretation or application of the UNFSA, the UNCLOS dispute settlement procedures will apply. Thus, under Article 30(1) of the 1995 UNFSA, the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement whether or not these states are also parties to the UNCLOS. Moreover, Article 30(2) of the UNFSA states that the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS apply *mutatis mutandis* to any dispute between State Parties to this Agreement concerning the interpretation or application of a sub-regional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention. Furthermore, according to

46. UNCLOS, *supra* note 2, art. 280 ("Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.").

Article 30(3) of the UNFSA, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to Article 287 of the UNCLOS for the settlement of disputes (that is, arbitration or special arbitration), the disputing parties should go to ITLOS or ICJ for resolution.

C. Jurisdiction of ITLOS Under Multilateral Treaties, in Which Parties Agree to Refer Their Disputes to the Tribunal for Settlement

Article 21 of the ITLOS Statute states: "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."[47] Article 22 of the same Statute reads: "[i]f all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal."[48] Accordingly, for example, the parties to the HSCA, which entered into force on April 24, 2003, can use ITLOS as a method of resolving disputes arising from interpretation or application of the provisions contained in the HSCA in accordance with Article 9(3) of the Agreement. In other words, ITLOS has jurisdiction over the dispute on the basis of the so called "*compromise* clause" provided in multilateral treaties. Similarly, if in agreement, parties to the Convention for Conservation and Management of Highly Migratory Fishing Stocks in the Western and Central Pacific or the SBT Convention can also choose to send disputes to ITLOS for resolution. It should be noted here that the wording "any other agreement" mentioned in Article 21 of the ITLOS Statute is the same as the wording contained in Article 20 of the same Statute, which are not limited to agreements between States or international organizations, but also includes autonomous federations or territories, and the agreements signed by States and other entities. However, some scholars have pointed out, if based on the regulations of Article 1(4) of the ITLOS Statute, it seems that whether ITLOS has jurisdiction over certain disputes or not is greatly limited by Article 288 of the UNCLOS. That is to say that the wording of "any other agreement" contained in Article 21 of the ITLOS Statute should be strictly interpreted.[49]

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47. ITLOS, *supra* note 1, art. 21.
48. *Id.* art. 22.
49. EIRIKSSON, *supra* note 44, at 113.

D. Jurisdiction of ITLOS Under an Agreement Concluded Between Parties to a Dispute That Refer Their Disputes to ITLOS for Settlement

When a party to a certain dispute signs an agreement with the other party to the dispute, agreeing to send their dispute to ITLOS for settlement, ITLOS has jurisdiction over this dispute. This "special agreement" concluded by the parties to the dispute, is usually called "*compromise.*" Article 24(1) of the ITLOS Statute provides that "[d]isputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated." Article 280 of the UNCLOS states that nothing impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice. This so-called "any peaceful means" naturally includes referring disputes to ITLOS for judicial settlement. In addition, parties to a dispute can undergo the method of so-called "*forum prorogatum*" and refer disputes to ITLOS for trial. However, before ITLOS has jurisdiction over the dispute, it must obtain the consent from the other party later.[50]

V. CAN "ENTITIES OTHER THAN STATE PARTIES" BECOME PARTIES TO A CASE BEFORE ITLOS?

Article 20(2) of the ITLOS Statute reads: "[t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case." In the first situation, "Entities other than State parties" have the possibility to become Parties to the "Seabed Disputes

50. International Tribunal for the Law of the Sea: Rules of the Tribunal, U.N. Doc. ITLOS/8 (April 27, 2005), *available at* http://www.itlos.org/documents_publications/documents/Itlos.8.E.27.04.05.pdf (stating according to Item 5

> [w]hen the applicant proposes to found the jurisdiction of the Tribunal upon a consent thereto yet to be given or manifested by the party against which the application is made, the application shall be transmitted to that party. It shall not however be entered in the List of Cases, nor any action be taken in the proceedings, unless and until the party against which such application is made consents to the jurisdiction of the Tribunal for the purposes of the case.).

Chamber" or the "Special Tribunal" set up under ITLOS.[51] It is unclear what the exact meaning of the last half of Article 20(2) of the ITLOS Statute regarding access to the Tribunal is, in particular pursuant to "any other agreement." There are differing viewpoints about whether this should be interpreted more strictly or broadly.

Chandrasekhara Rao, former President of ITLOS points out that the stipulations of Article 20 of the ITLOS on access to the Tribunal mainly implements Article 291, paragraph 2 of the UNCLOS,[52] which reads that "[t]he dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention."[53] Article 21 of the ITLOS Statute further stipulates that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."[54] Moreover, Article 22 of the same Statute reads: "[i]f all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal."[55] However should the wording "any other agreement" mentioned above in the ITLOS Statute be "international agreement" as stipulated in Article 288, paragraph 2, of the UNCLOS?[56] Chandrasekhara Rao believes that the wording "any other agreement" mentioned in Article 20 of the ITLOS Statute excludes standard domestic legal contracts, and applicable targets should be agreements bound by international law. Despite this, so long as this Agreement correlates with the objective of the UNCLOS, it can enable entities other than State Parties to become Parties to the UNCLOS.[57] Dr. Hubertus W. Labes also supports this view. He believes that Article 21 and 20(2) of the ITLOS Statute refer to "agreement" and not "international agreement" which broadens the jurisdiction of ITLOS."[58]

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51. *See* UNCLOS, *supra* note 2, art. 188.

52. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 7 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).

53. UNCLOS, *supra* note 2, art. 291(2).

54. ITLOS, *supra* note 1, art. 21.

55. ITLOS, *supra* note 1, art. 22.

56. UNCLOS, *supra* note 2, art. 288, para. 2 ("A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.").

57. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE, *supra* note 52, at 7-8.

58. Hubertus W. Labes, Jurisdiction of the Law of the Sea Tribunal for (private) Arbitration Procedures 30 (Mar. 2, 2000) (unpublished paper, presented at the Annual

Another European scholar Bernard Vanheule points out that the concepts embodied in the UNCLOS are definitely a gray area. Nevertheless, ITLOS must have jurisdiction over these disputes according to the articles contained in the UNCLOS, treaties or conventions, as well as relevant regulations under international agreements. In addition, if entities other than state parties want to get access to ITLOS they must "specifically", "expressly" refer to the UNCLOS, other related treaties or conventions, or international agreements.[59] American legal scholar Bernard H. Oxman believes that because Article 20 and Article 21 of the ITLOS Statute use the wording "agreement" and omit deliberately the word "international", and given the fact that the wording "treaty" or "convention" referred to in Article 22 of the same Statute is different from the use of "agreement", a freer and broader interpretation of the meaning of "any other agreement" is a more correct one.[60] Lastly, the first President of ITLOS, Thomas A. Mensah, adopts quite a cautious viewpoint towards the issue of whether the use of "agreement" in Articles 20 and 21 of the ITLOS Statute means an "international agreement." He points out that only when there is a case referred to ITLOS for trial based on an agreement, then according to the relevant circumstances, the Tribunal can give a clearer answer to the issue of whether the "agreement" referred to in Articles 20 and 21 of the ITLOS Statute must be regarded as referring to an "international agreement" or not.[61]

Meetings of the Association for the Advancement of Insurance Science, Hamburg, Germany, on file with author).

59. Bernard Vanheule, *Arrest of Seagoing Vessels and the LOS Convention: Does the New International Tribunal for the LOS Offer New Prospects?*, 5 INT'L MAR. L. 106, 112-13 (1998).

60. Bernard H. Oxman, Does the International Tribunal for the Law of the Sea Have Jurisdiction over Disputes with Taiwan? 12 (Dec. 10, 2004) (unpublished paper, presented at International Symposium on the Law of the Sea and Taiwan, on file with author).

61. Thomas A. Mensah, *The Jurisdiction of the International Tribunal for the Law of the Sea*, 63 RABELS ZEITSCHRIFT (F.R.G.) 337 (1999) (presentation held at Common Symposium of the Max-Planck Institute of Foreign and Private International Law and the International Tribunal for the Law of the Sea).

VI. THE ISSUE OF JURISDICTION IN THE "*SOUTHERN BLUEFIN TUNA CASE*" AND THE ORDER OF ITLOS AND THE AWARD OF THE ANNEX VII ARBITRAL TRIBUNAL

In 1999 ITLOS rendered its order and prescribed certain provisional measures in the *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (Provisional Measures) according to Article 290, paragraph 5, of the UNCLOS[62] and in August 2000 the Arbitral Tribunal constituted under Annex VII of the UNCLOS rendered its award in the *Southern Bluefin Tuna Case* (Australia and New Zealand v. Japan) (Jurisdiction and Admissibility).[63] The disputing parties in these cases, namely, Australia, New Zealand, and Japan, are all parties to the SBT Convention,[64] and the UNCLOS,[65] and therefore are bound by the provisions contained in these two treaties, including the obligation to abide by the relevant provisions concerning the dispute settlement procedures.

In these two cases, Japan claimed that the settlement of disputes between Japan and Australia/New Zealand concerning the conservation and management of SBT should be resolved in accordance with the dispute settlement procedure provided in Article 16 of the SBT Convention. Accordingly, both ITLOS and the Annex VII Arbitral Tribunal would have no jurisdiction over these disputes. Australia and New Zealand had a differing viewpoint, arguing that Article 16 of the SBT Convention does not exclude the application of Part XV of the UNCLOC concerning mandatory procedure for dispute settlements. Accordingly, both ITLOS and the Annex VII Arbitral Tribunal had jurisdiction over the disputes arising from SBT conservation and management measures between Australia, New Zealand and Japan. According to Article 288, paragraph

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62. International Tribunal for the Law of the Sea: Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl., Japan) (Provisional Measures), Aug. 27, 1999, 38 I.L.M 1624, at 1631-32 (1999).

63. *See* Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS): Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan) (Award on Jurisdiction and Admissibility), Aug. 4, 2000, 39, I.L.M. 1359 (2000).

64. *See* SBT Convention, *supra* note 5, art. 17 (stating that Australia, New Zealand and Japan on May 10, 1993 signed the Convention for Conservation of Southern Bluefin Tuna and this Convention became effective on May 20, 1994).

65. *See* Division for Ocean Affairs and the Law of the Sea, Oceans and Law of the Sea: Chronological lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at November 2, 2006, *supra* note 2 (stating that on October 5, 1994 Australia became a State Party to the UNCLOS; Japan became a State Party on June 20, 1996 and New Zealand became a State Party to the same Convention on July 19, 1996).

4, of the UNCLOS, "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal." On August 27, 1999, ITLOS ruled that it had jurisdiction over the "*Southern Bluefin Tuna* (Provisional Measures) Case." However, on August 4, 2000, the Annex VII Arbitral Tribunal decided that it was without jurisdiction to rule in the "*Southern Bluefin Tuna* (Jurisdiction and Admissibility) Case." The background of the "*Southern Bluefin Tuna*" Case, judicial proceedings, and the rulings over the issue of jurisdiction are addressed below.

A. The Background of the "Southern Bluefin Tuna" Case[66]

At the first conference held after the establishment of the CCSBT in 1994, the three founding members, Australia, New Zealand and Japan

66. There are many articles related to this case including the following: Dean Bialek, *Australia & New Zealand V Japan Southern Bluefin Tuna Case*, 1 MELB. J. INT'L L.,153, 153-61 (2000); Alan Boyle, *The Southern Bluefin Tuna Arbitration*, 50 INT'L & COMP. L. Q. 447, 447-52 (2001); Tim Stephens, *A Paper Umbrella Which Dissolve in the Rain" Implications of the Southern Bluefin Tuna Case for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 LOS Convention*, 6 ASIA PAC. J. ENVTL. L. 297, 297-318 (2001); Kristina Leggett, *The Southern Bluefin Tuna Cases: ITLOS Order on Provisional Measures, 9* REV. EUR. CMTY. & INT'L. ENVTL. L. 75, 75-79 (2000); Malcolm D. Evans, *The Southern Bluefin Ttuna Dispute: Provisional Thinking on Provisional Measures?,* 10 Y.B. INT'L ENVTL. L. 7, 7-14 (1999); Francisco Orrego Vicuna, *From the 1983 Bering Sea Fur-Seals Case to the 1999 Southern Bluefin Tuna Cases: A Century of Efforts at Conservation of the Living Resources of the High Seas*, 10 Y.B. INT'L ENVTL. L. 40, 40-47 (1999); Howard S. Schiffman, *The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute*, 2 J. INT'L WILDLIFE L. & POL'Y 318, 318-33 (1999); Moritaka Hayashi, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea,* 13 TUL. ENVTL. L.J. 361, 361-85 (2000); Barbara Kwiatkowska, *The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal*, 16 INT'L J. MARINE & COASTAL L. 239, 239-93 (2001); Caroline E. Foster, *The 'Real Dispute' in the Southern Bluefin Tuna Case: A Scientific Dispute?, 16* INT'L J. MARINE & COASTAL L. 571, 571-601 (2001); Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like it or Not*, 32 OCEAN DEV. & INT'L L. 313, 313-48 (2001); Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources,* 11 EUR. J.INT'L L. 815, 815-31 (2000); Shabtai Rosenne, *The International Tribunal for the Law of the Sea: Survey for 1999,* 15 INT'L J. MARINE & COASTAL L. 443, 464-74 (2000); Barbara Kwiatkowska, *The Southern Bluefin Tuna Award (Jurisdiction and Admissibility,* 1 LIBER AMICORUM JUDGE SHIGERU ODA 697, 697-730 (2002); Stephen M. Schwebel, *The Southern Bluefin Tuna Case,* 1 LIBER AMICORUM JUDGE SHIGERU ODA 743, 743-48 (2002); Chusei Yamada, *Priority Application of Successive Treaties Relating to the Same Subject Matter: The Southern Bluefin Tuna Case,* 1 LIBER AMICORUM JUDGE SHIGERU ODA 763, 763-71 (2002).

passed a resolution setting TAC of SBT at 11,750 mt, with national allocations set at: Japan (6,065 mt), Australia (5,265 mt) and New Zealand (420 mt). However since 1998, the CCSBT had been unable to reach agreement regarding TAC of SBT and thus Australia, New Zealand and Japan decided to maintain the TAC level decided in 1994.[67] The main reason that they were unable to reach a consensus was that Japan believed the SBT stocks were already recovered, and therefore the TAC of SBT could be increased. Australia and New Zealand both thought differently, arguing that if they wanted to return to the 1980 levels of SBT stocks by 2020, CCSBT member States should not increase SBT catch amounts. At the same time, Japan submit a proposal to the Commission, which increased the TAC of SBT set in 1994 by 6,000 mt and half of the increased TAC, that is, 3,000 mt, being allotted to Japan. In addition, Japan also proposed to reach an agreement with Australia and New Zealand to set up a joint Experimental Fishing Program (EFP), whose particular goals were studying the SBT amount to help verify if the SBT stocks had indeed been recovered, and reducing the degree of scientific uncertainty regarding the number of SBT stocks. Thereafter, despite vigorous protests by Australia and New Zealand over pursuance of any unilateral EFP, Japan conducted the pilot program in the summer of 1998 which was to last for three years. Under the program, in addition to the allotted 6,605 mt as mentioned earlier, Japan also increased its SBT catch by 1,464 mt.[68] Australia and New Zealand lodged their protests over the Japanese unilateral act, and immediately requested to have urgent dialogue with Japan according to Article 16 of the SBT Convention.

In May 1999, Japan informed Australia and New Zealand that unless they accepted Japan's proposal to start implementation of the joint experimental fishing program in 1999, Japan would recommence unilateral experimental fishing program on June 1 of that year. Australia and New Zealand found Japan's suggestion unacceptable, and indicated that if Japan started direct unilateral implementation of the EFP, that would constitute termination of negotiations under Article 16 of the SBT Convention. However, Japan began unilateral implementation of the EFP on June 1, 1999, and at the same time replied that it had no intention of terminating the consultations with Australia and New Zealand. It also maintained that the independent scientific opinion, that was reported to the Commission, supported Japan's EFP proposals.[69] On June 23, 1999,

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67. *See* UNCLOS Arbitral Tribunal: Southern Bluefin Tuna Case, *supra* note 63, at 1366.
68. *See id.* at 1367.
69. *See id.*

Australia restated its position that the dispute did not relate solely to Japan's obligations under the SBT Convention, but also involved its obligations under the UNCLOS and customary international law. Also on June 23, 1999, Japan stated that it was ready to have the dispute resolved by mediation under the provisions of the SBT Convention. Australia replied that it was willing to submit the dispute to mediation, provided that Japan agreed to cease its unilateral experimental fishing and that the mediation was expeditious. On July 14, 1999, Japan reiterated its position that its EFP was consistent with the SBT Convention and that it could not accept the condition set by Australia for mediation to proceed. Japan declared again that it was ready to have the dispute resolved by mediation pursuant to Article 16, paragraph 2 of the SBT Convention. While indicated it was not prepared to halt its unilateral EFP, Japan expressed its willingness to resume consultations with Australia and New Zealand. Thereafter Australia notified Japan that it viewed Japan's position as a rejection of Australia's conditional acceptance of mediation, and that Australia had decided to commence compulsory dispute resolution under Part XV of the UNCLOS. It followed that it did not accept Japan's proposal for arbitration pursuant to Article 16(2) of the SBT Convention. Australia emphasized the centrality of Japan's obligations under UNCLOS and under customary international law and the need for those obligations to be addressed if the dispute were to be resolved. Australia reiterated its view that the conduct of Japan under the 1993 Convention was relevant to the issue of its compliance with the UNCLOS obligations and may be taken into account in dispute settlement under Part XV of the same Convention. Pending the constitution of the arbitral tribunal to which the dispute was being submitted under Annex VII of the UNCLOS, Australia announced its intention to seek prescription of provisional measures by the relevant judicial bodies in accordance with Article 290, paragraph 5, of the UNCLOS, with the major aim of forcing Japan to immediately stop its unilateral EFP.[70]

On July 15, 1999, Australia and New Zealand separately informed Japan of the decision to submit a request to the relevant courts or tribunals to prescribe provisional measures. On July 30, 1999, Australia and New Zealand on the basis of regulations of Article 290(5) of the UNCLOS, separately made formal requests for ITLOS to prescribe provisional measures. The requests of Australia and New Zealand were

70. *See id.*

assigned numbers and became tribunal judgment cases number three and number four. On August 16, 1999, ITLOS pronounced that the case submitted by Australia and the case submitted by New Zealand were merged into one. Lastly on August 27, 1999, ITLOS determined, after concluding that the Annex VII Arbitral Tribunal would have *prima facie* jurisdiction to hear the dispute over the conservation and management measures of SBT between Australia, New Zealand and Japan, that it had jurisdiction with respect to the request for provisional measures. Thus ITLOS rendered an order prescribing certain provisional measures, including that Japan must cease its unilateral EFP.

Regarding the judicial proceeding of Annex VII Arbitral Tribunal in the *Southern Bluefin Tuna* Case (Jurisdiction and Admissibility), it was on August 31, 1998 when Australia and New Zealand separately delivered diplomatic notes to Japan formally informing Japan of the existence of a dispute between them regarding the conservation and management of SBT. Because when Australia, New Zealand and Japan signed or ratified the UNCLOS they had not made a declaration according to Article 287(1) choosing the method of dispute settlement, under Article 287(3) of the UNCLOS, they "shall be deemed to have accepted arbitration in accordance with Annex VII." Thus on July 15, 1999, Australia and New Zealand delivered their statements to Japan, requesting to proceed to arbitration in accordance with the Annex VII of the 1982 UNCLOS.[71] Not long after ITLOS rendered its order on the *Southern Bluefin Tuna* Case (provisional measures) in August 1999, the following five arbitrators were appointed according to Article 3 of the Annex VII of the UNCLOS: Justice Sir Kenneth Keith KBE of the Court of Appeal of New Zealand (appointed by Australia and New Zealand), Ambassador Chusei Yamada (the Chairman of the International Law Commission and appointed by Japan), Judge Stephen M. Schwebel, the former ICJ President (United States, appointed as neutral arbitrator), Judge Florentino Feliciano of the Appellate Body of the World Trade Organzation (Philippines, appointed as neutral arbitrator), and Judge Per Tresselt of the European Free Trade Association Court (Norway, appointed as neutral arbitrator). The "Annex VII Arbitral Tribunal" was composed of these five arbitrators.[72] The award rendered by the Annex VII Arbitral Tribunal in the *Southern Bluefin Tuna* Case (Jurisdiction and Admissibility) marked the first instance of the application of compulsory arbitration under Part XV, Section 2, of the UNCLOS since the entry into force of the Convention

71. UNCLOS, *supra* note 2, art. 287, para. 3 ("A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.").

72. Kwiatkowska, *supra* note 66, at 247.

and as such is very significant.[73] On August 4, 2000, the Annex VII Arbitral Tribunal declined to exercise jurisdiction over the dispute in the *Southern Bluefin Tuna* Case (Jurisdiction and Admissibility), and at the same time, revoked the prescription of provisional measures ordered by ITLOS on August 27, 1999.

B. Opposing Arguments Related to the Jurisdiction in the Southern Bluefin Tuna Case and the Final Ruling of the Tribunals

During the proceedings of the *Southern Bluefin Tuna* Case (Provisional Measures), Japan argued that ITLOS did not have jurisdiction in this case; Australia and New Zealand held a different viewpoint. On July 15, 1999, New Zealand and Australia sent statements to Japan, expressing their intent to send the following matters for judgment to the Arbitral Tribunal established under the Annex VII of the UNCLOS: (1) Japan had breached its obligations under Article 64 and Articles 116 to 119 of the UNCLOS in relation to the conservation and management of the SBT stocks, including (a) Japan's failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 and contrary to the obligation under Article 117 to take necessary conservation measures for its nationals; (b) Japan's carrying out the unilateral EFP in 1998 and 1999 which resulted in SBT being taken by Japan over and above the previously agreed CCSBT national catch allocations; (c) the action of Japan's taking unilateral experimental fishing encroached upon the rights and interests of Australia and New Zealand that are recognized under Article 116(b) of the UNCLOS; and Japan's allowing its nationals to catch additional SBT in the course of experimental fishing in a way which created a result of discrimination against the fishermen of Australia and New Zealand in accordance with Article 119 (3) of the UNCLOS; (d) Japan's failing in good faith to co-operate with Australia and New Zealand with a view to ensuring the conservation of SBT, as required by Article 64 of the 1982 UNCLOS; and Japan's failing in its obligations under the UNCLOS to take precautionary measures in respect of the conservation and management of SBT;[74] (2) As a consequence of the aforesaid

73. *Id.* at 241.
74. International Tribunal for the Law of the Sea: Southern Bluefin Tuna Cases, *supra* note 62, at 1627.

breaches of the UNCLOS, Japan should: (a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of New Zealand and Australia; (b) negotiate and co-operate in good faith with New Zealand and Australia, including through the Commission, with a view to agreeing to future conservation measures and TAC for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield; (c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with New Zealand and Australia until such time as agreement is reached with New Zealand and Australia on an alternative SBT catch level; and (d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999; and (3) Japan pays New Zealand's costs of proceedings.[75]

In addition, prior to the establishment of the Annex VII Arbitral Tribunal, Australia and New Zealand requested that Japan: (1) agree to certain provisional measures with respect to the disputes over the conservation and management of SBT stocks; and (2) agree to submit the question in relation to the said provisional measures to ITLOS. If Japan did not so agree within two weeks, immediately on the expiry of the two-week period and without further notice, Australia and New Zealand would reserve the right to request ITLOS to prescribe the provisional measures that included the following: (1) Japan immediately ceases unilateral experimental fishing for SBT; (2) Japan restricts its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999; (3) the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute; (4) the parties ensure that no action of any kind is taken which might aggravate, extend or make it more difficult for solution of the dispute that is submitted to the Annex VII Arbitral Tribunal; and (5) the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render.[76]

On July 30, 1999, Japan replied to ITLOS, asking that the request of Australia and New Zealand for the prescription of provisional measures should be denied. On August 20 of that same year, Japan presented its

75. *Id.* at 1628.
76. *Id.* at 1629.

final submission. The basis of Japan's argument included the following counterclaims: Disputes arising over the conservation and management of SBT mainly involve the relevant regulations of the SBT Convention, thus the resolution of disputes should be in accordance with the dispute settlement procedures provided in Article 16 of this Convention; disputes related to the conservation and management of SBT do not involve legal principles, but disputable scientific issues; Australia and New Zealand should continue consulting with Japan in accordance with Part XV, Section 1, of the UNCLOS, and the principle of good faith; as New Zealand and Australia ceased dialogue with Japan, they have not yet satisfied the regulations of Part XV of the UNCLOS binding them to compulsory dispute settlement procedures; SBT is not threatened by unredeemable losses; Article 64 of the UNCLOS stipulates the obligation of cooperation, but does not set definite conservation principles or concrete conservation measures; and finally, it is doubtful whether the precautionary principle has obtained legal status as a rule under customary international law. Therefore, the Annex VII Arbitral Tribunal does not have *prima facie* jurisdiction over the SBT conservation and management disputes between Australia, New Zealand and Japan. If the Annex VII Arbitral Tribunal does not have jurisdiction, ITLOS, as Japan argued, therefore has no right to prescribe provisional measures in accordance with Article 290, paragraph 5 of the UNCLOS. However if ITLOS determines that in this case it still has jurisdiction, then, in accordance with the ITLOS Rules of the Tribunal Article 89(5),[77] Japan requested the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. Should Japan, Australia, and New Zealand not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be referred to the panel of independent scientists for their resolution.[78]

77. International Tribunal for the Law of the Sea: Rules of the Tribunal, *supra* note 50, art. 89(5) ("When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure.").

78. International Tribunal for the Law of the Sea: Southern Bluefin Tuna Cases,

In August 1999, ITLOS carried out preliminary deliberations, giving the following reasons in support of its judgment that it has jurisdiction over the *Southern Bluefin Tuna* Case (Provisional Measures): the differences between Australia, New Zealand and Japan with regard to SBT conservation and management measures also concern points of law; under Article 64, read together with Articles 116 to 119, of the UNCLOS, States Parties to this Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species (*thunnus maccoyii*); SBT is listed in Annex I of the UNCLOS; the conduct of the parties within the CCSBT established in accordance with the SBT Convention, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the UNCLOS; in the view of ITLOS, the provisions of the UNCLOS invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded; in the view of ITLOS, the fact that the SBT Convention applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the UNCLOS; that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New Zealand as being under the SBT Convention and also under the UNCLOS; in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the UNCLOS when it concludes that the possibilities of settlement have been exhausted; in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the UNCLOS have been fulfilled; for the above reasons, ITLOS found that the Annex VII Arbitral Tribunal would *prima facie* have jurisdiction over the disputes.[79]

Article 290, paragraph 5, of the UNCLOS provides that

> [p]ending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

Because ITLOS in its preliminary deliberations had already ruled that the Annex VII Arbitral Tribunal had jurisdiction over the disputes

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supra note 62, at 1631.

79. *Id.* at 1631-33.

related to the conservation and management of SBT between Australia, New Zealand and Japan, if ITLOS wants to proscribe provisional measures it must be as "the urgency of the situation so requires." Japan argued that SBT is not threatened by unredeemable losses, thus the urgency of the situation required for the proscription of temporary measures does not exist. However, ITLOS held that the conservation of the marine living resources is an element in the protection and preservation of the marine environment; that there is no disagreement between the parties that the stock of SBT is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern; that there is scientific uncertainty regarding measures to be taken to conserve the stock of SBT and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of SBT; that the parties should intensify their efforts to cooperate with other participants in the fishery for SBT with a view to ensuring conservation and promoting the objective of optimum utilization of the stock; that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the SBT stock; that in the view of the Tribunal, catches taken within the framework of any experimental fishing program should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria; and that "Japan made a clear commitment that the 1999 experimental fishing program will end." ITLOS therefore ruled that it is appropriate to prescribe provisional measures under the circumstances.[80] Accordingly, ITLOS prescribed the following six provisional measures:

1) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;
2) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;
3) Australia, Japan and New Zealand shall ensure, unless they agree otherwise that their annual catches do not exceed the annual national allocations at the levels last agreed by the

80. *Id.* at 1633-35.

parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

4) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);
5) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;
6) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.[81]

As to whether the Annex VII Arbitral Tribunal has jurisdiction over disputes related to SBT conservation and management, Japan believes that this Tribunal has no jurisdiction over the substantial issues of the disputes. The reasons put forward by Japan are explained as follows: First, the dispute necessarily is one concerning the interpretation and application of the SBT Convention and not a dispute over the interpretation or application of the UNCLOS. Under both the customary international law and the 1982 UNCLOS, Japan or any other states are not obligated to reach an agreement with the parties to the SBT Convention prior to the carrying out of the SBT experimental fishing program. As pointed out by Japan, the dispute between Japan and Australia and New Zealand arising from the implementation of the SBT conservation and management measures and the consultations or negotiations between them for the purpose of settling the dispute were carried out within the framework established under the SBT Convention. The main purpose for Australia and New Zealand to invoke the UNCLOS and the relevant customary

81. *Id.* at 1635-36 (stating the 21 Judges of ITLOS added a temporary appointment judge making 22 judges in total and the voting situation on the stipulation of provisional measures is as follows: The first provisional measure: 20 votes to 2; The second provisional measure; 20 votes to 2; the third provisional measure: 18 to 4; the fourth provisional measure: 20 votes to 2; the fifth provisional measure; 21 votes to 1; the sixth provisional measure: 20 votes to 2).

international law is to request ITLOS to prescribe provisional measures, which is an artifice of Australia and New Zealand to evade the application of the dispute settlement procedure provided in Article 16 of the SBT Convention. Second, while New Zealand, Australia, and Japan had signed the SBT Convention in May 1993, which then entered into force in May 1994, they ratified the UNCLOS in 1996. Before their ratification of the UNCLOS, these three countries had been bound by the SBT Convention for a period of some 26 months. Therefore, the governing treaty in respect of the settlement of the dispute arising from the conservation and management of SBT is not 1982 UNCLOS but the SBT Convention.[82]

Third, while the UNCLOS is a multilateral international treaty and is regarded as a framework or umbrella convention and was adopted earlier than the SBT Convention, and the SBT Convention can be considered an implementing agreement of the UNCLOS, Japan argues that based on the principles of the *lex posterior* and the *lex specialis*, Article 16 of the SBT Convention should be the provision to be applied to resolve the issue of jurisdiction excised by the Tribunal. Fourth, Japan pointed out that the major reason for Australia and New Zealand not to bring suit against Korea, Taiwan and Indonesia in accordance with the relevant provisions contained in the UNCLOS for their failure to take actions to conserve and manage the SBT was because they are not contracting parties to the SBT Convention. It therefore demonstrates that the SBT Convention should be treated as an effective treaty that bound Australia, New Zealand, and Japan in the settlement of their dispute over the conservation and management of SBT. Fifth, Japan further pointed out that the regulations provided in Article 311 of the UNCLOS, concerning this Convention's relation to other conventions and international agreements, is also consistent with Japan's analysis, namely the UNCLOS should not alter the rights and obligations of State Parties which arise from other agreements compatible with the UNCLOS, namely the SBT Convention. Since the provisions provided in the SBT Convention are compatible with Article 64 of the UNCLOS, Japan argued that its right under the SBT Convention should not be altered. Even though disputes related to the conservation and management of SBT really involve the interpretation and application of the UNCLOS (Japan opposed this viewpoint), according to Article 280 of the UNCLOS, "[n]othing in this Part impairs

82. UNCLOS Arbitral Tribunal: Southern Bluefin Tuna Case, *supra* note 63, at 1376.

the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." The parties to the *Southern Bluefin Tuna* case can adopt the procedures for dispute settlement methods pursuant to Article 16 of the SBT Convention. In addition, parties to a dispute can at any time before or after the dispute arises choose the means of dispute settlement.[83]

Sixth, Japan claims that during the proceedings, if its disputes with Australia and New Zealand truly arise from the interpretation and application of both the SBT Convention and the UNCLOS, then Article 16 of the SBT Convention, *arguendo*, should be considered consistent with Article 281, paragraph 1, of the 1982 UNCLOS, which provides that "[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure." Thus, in accordance with Article 16(2) of the SBT Convention, no dispute should be referred to the ICJ or to arbitration without their consent.[84] Seventh, Japan cites a very large number of treaties that relate to the law of the sea, such as the International Convention for the Regulation of Whaling, that have dispute settlement provisions but have no compulsory settlement. The reason for these treaties not including the provisions of compulsory dispute settlement is their intention to avoid the application of Part XV, Section 2, of the UNCLOS concerning compulsory adjudication or arbitration. If the Annex VII Arbitral Tribunal would determine that Part XV of the UNCLOS should be first applied before the application of the SBT Convention, the dispute settlement provisions contained in a large number of international treaties that relate to matters embraced by the UNCLOS would be profoundly disturbed.[85]

Eighth, while Australia and New Zealand argue that the UNCLOS establishes a "new and comprehensive legal regime for all ocean space" and a vital element of which is "mandatory" settlement of dispute, Japan

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83. *Id.* at 1377.

84. SBT Convention, *supra* note 5, art. 16, para. 2 states:

> Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

85. UNCLOS Arbitral Tribunal: Southern Bluefin Tuna Case, *supra* note 63, at 1376-77.

points out that in fact the peaceful settlement provisions of the UNCLOS are flexible and are designed to allow parties to a dispute to choose their own means of peaceful settlement. Japan further argues, even if the Annex VII Arbitral Tribunal indeed considers the dispute over the conservation and management of SBT relevant to the interpretation and application of the regulations provided for in the UNCLOS, it should decline to pass upon the merits of the *Southern Bluefin Tuna* case, mainly because both Australia and New Zealand had failed to meet the conditions governing such recourse set out in the UNCLOS. As mentioned earlier, Article 280 of the UNCLOS provides that "[n]othing in this Part [Part XV] impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." The wording "at any time" written in this provision implies that it embraces not only disputes that have already arisen but also disputes that may arise. Under Article 16 of the SBT Convention, the parties to the *Southern Bluefin Tuna* case had chosen the peaceful means of dispute settlement listed therein, which do not include compulsory arbitration pursuant to Part XV of the 1982 UNCLOS. Japan points out that Australia and New Zealand had not exhausted the means of peaceful dispute settlement, in particular, not accepting Japan's proposal for mediation and arbitration under the SBT Convention. In addition, Japan states that Australia and New Zealand failed to fulfill their obligations under Article 16 of the SBT Convention to negotiate with Japan for the resolution of the dispute. Moreover, as argued by Japan, conditions should be attached to when a party to a dispute decides to apply Article 281 of the UNCLOS to resort to compulsory dispute settlement. That is, the party to the dispute must reach an agreement with another party to the dispute, agreeing that other procedures for dispute settlement are not excluded. Japan believes that Article 16 of the SBT Convention excludes other procedures for dispute settlement that are not agreed to by all of the parties to the dispute. In other words, mainly because the parties to the Southern Bluefin Tuna case had not reached any agreement to submit the dispute to other procedure of dispute settlement, Part XV, Section 2 of the UNCLOS concerning compulsory dispute settlement cannot be applied.[86]

86. *Id.* at 1377-78.

Ninth, Japan argued that under Article 282 of the UNCLOS, which provides that: "[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree," Australia and New Zealand should have submitted their dispute to the ICJ for settlement that entails a binding decision. But these two countries failed to do so, which is considered a violation of the obligation under Article 282. Even if the dispute were submitted to the ICJ by Australia and New Zealand, Japan would have opposed the jurisdiction of the Court over the case, on the grounds of reservation to the Optional Clause of the ICJ Statute. In addition, Australia and New Zealand also failed to proceed to negotiation with Japan for the resolution of the dispute in accordance with Article 283 of the UNCLOS.[87] Lastly, Japan holds that the Annex VII Tribunal should not rule over the *Southern Bluefin Tuna* case based on the following three arguments: (1) The SBT dispute is a scientific, not a legal issue; (2) Australia and New Zealand's vague and elusive reference to articles of the UNCLOS is insufficient and difficult to be understood; and there is a failure to identify a cause of action; (3) Japan has already accepted a catch limit proposed by Australia for its EFP of 1,500 mt, reduced from 1,800 mt, and thus the dispute is moot.[88]

On the contrary to Japan's arguments, both the arguments of Australia and New Zealand are in support of the Annex VII Arbitral Tribunal's jurisdiction over the dispute concerning the conservation and management of SBT stocks, which include the following contentions: (1) that ITLOS was unanimous in its finding that this Tribunal has *prima facie* jurisdiction; (2) the UNCLOS established a new and comprehensive legal regime for all ocean space; the importance of the obligations it contains were such "that their acceptance was seen as critically dependent upon the establishment of an effective, binding and compulsory system for resolving all disputes concerning the interpretation and application of the Convention as a whole"; the Annex VII Arbitral Tribunal should sustain the effectiveness and comprehensive character of the dispute settlement regime established by the UNCLO; (3) Japan has not only failed to take the necessary action to conserve the SBT stock, but also endangered that stock by an experimental fishing program that was unilateral, contained a high component of commercial fishing and did not comply with agreed

87. *Id.* at 1379.
88. *Id.*

guidelines for experimental fishing; the dispute is about the primacy of conservation over exploitation of a seriously depleted stock; Japan is exploiting the SBT stock with unnecessary risk and is thereby in breach of its obligations under Articles 64 and 116-119 of the UNCLOS. Accordingly, it is clear that the dispute is related to the interpretation and application of the UNCLOS. In addition, Australia and New Zealand, in rejecting Japan's Preliminary Objections, made the following final submissions: that the Parties differ on the question whether Japan's EFP and associated conduct is governed by the UNCLOS; that a dispute thus exists about the interpretation and application of the UNCLOS within the meaning of Part XV; that all the jurisdictional requirements of that Part have been satisfied; and that Japan's objections to the admissibility of the dispute are unfounded.[89]

In the view of the Annex VII Arbitral Tribunal, the case is not moot because of the following reasoning. First, while Japan is willing to reduce its EFP catch from 1,800 tons to 1,500 tons, it does not resolve the dispute with Australia and New Zealand over the SBT conservation and management measures, given the fact that Australia and New Zealand have made it clear that they do not accept the catch limitation offered by Japan. Second, the dispute concerns both the quality and quantity of the EFP and other differences of element.[90] The Tribunal believes that the core of the dispute relates to differences about the level of a TAC and to Japan's insistence on conducting, and its conduct of, a unilateral experimental fishing program. What profoundly divides the Parties is whether the dispute arises from the interpretation and application of the SBT Convention or from the relevant provisions of the UNCLOS. The Tribunal points out that it is clear that the most acute elements of the dispute between the Parties turn on their inability to agree on a revised TAC, the related conduct by Japan of unilateral experimental fishing in 1998 and 1999, and Japan's announced plans for such fishing to be continued thereafter. Those elements of the dispute were clearly within the mandate of the CCSBT. It was there that the Parties failed to agree on a TAC. It was there that Japan announced in 1998 that it would launch a unilateral experimental fishing program. It was there that the Japanese EFP announcement was protested by Australia and New Zealand. It was also within the framework of CCSBT where the higher

89. *Id.* at 1385.
90. *Id.* at 1386.

level of diplomatic exchanges and consultations were taken place. What should be noted is the fact that there are no disagreements between Australia, New Zealand, and Japan over whether the dispute falls within the provisions of the SBT Convention. The real difference between them is whether the dispute also falls within the provisions of the UNCLOS.

As mentioned earlier, Australia and New Zealand contend that Japan's unilateral EFP has placed it in breach of its obligations under Articles 64, and Articles 116-119 of the UNCLOS. They argue that Japan under both the SBT Convention and the UNCLOS as well as customary international law is obligated to take actions to conserve the SBT stocks. But Japan argued in its counter-claims that the main reason for Australia and New Zealand to resort to the provisions of the 1982 UNCLOS is to achieve their goal of requesting ITLOS to prescribe provisional measures. In addition, the provisions cited by Australia and New Zealand are considered general regulations, which cannot bind the parties to the dispute over the SBT conservation and management. However, the Annex VII Arbitral Tribunal rejected Japan's arguments, indicating that it is a commonplace of international law and state practices for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes. For example, the international cooperative obligation in protecting and observing human rights under Articles 1, 55, and 56 of the Charter of the United Nations will not be discharged for UN member states by their signing and ratification of other human rights-related international treaties. The Annex VII Arbitral Tribunal therefore concluded that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centered in the SBT Convention, also arises under the UNCLOS. In its view, this conclusion is consistent with the regulations provided in Article 311(2) and (5) of the UNCLOS, and with the 1969 Vienna Convention on the Law of Treaties, in particular, Article 30, paragraph 3.[91]

The Annex VII Arbitral Tribunal turns to the question regarding whether the dispute settlement procedure provided in Part XV of the UNCLOS can be applied to the case without the consent of the parties to the dispute. It is the view of the Tribunal that Article 16 of the SBT Convention is not a peaceful means of dispute settlement but provides a list of different methods for dispute settlement and at the same time adds

91. *Id.* at 1388.

the wording of "other peaceful means of their own choice." However, the Tribunal points out that Article 16 of the SBT Convention is indeed one of the "peaceful means of their own choice" contained in Article 281, paragraph 1, and Article 281 of the UNCLOS. Accordingly, the conditions for the application of Article 281 have been fulfilled. In addition, as far as the objective of Article 281, paragraph 1, and Article 281 of the 1982 UNCLOS are concerned, Article 16, paragraph 2, of the SBT Convention does not require the parties to the dispute to negotiate with the parties on the other side indefinitely. It is the right of the parties to the dispute to conclude that no settlement has been reached.[92]

Lastly, it is the view of the Annex VII Arbitral Tribunal that according to the text of Article 16, paragraphs 1 and 2, of the SBT Convention, the application of the compulsory dispute settlement is indeed excluded. Based on this view, the Tribunal concluded that Article 16 of the SBT Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of the UNCLOS. In addition, the Tribunal, by referring to the regulations provided for in Part XV, Section 3, of the UNCLOS, explained that the application of Part XV, Section 2 (Compulsory Procedures Entailing Binding Decisions) is not without limitation. This finding is also used in support of the Tribunal's conclusion as stated above. The Tribunal points out that under Article 297 of the UNCLOS, the disputes, such as those concerning the right to navigation, overflight, and laying submarine cables or pipelines in a coastal state's Exclusive Economic Zone (EEZ), and the disputes concerning the preservation and protection of the marine environment are excluded from the application of the compulsory dispute settlement procedure as provided in Part XV, Section 2, of the UNCLOS. The Tribunal also points out the fact that

> . . . a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudication or arbitral procedures. Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and consultation or other methods acceptable to the parties to the dispute or by arbitration or recourse to the International Court of Justice by common agreement of the parties to the dispute.[93]

Without such exclusion, the right of the parties to a dispute to select their own means of dispute settlement in accordance with the dispute settlement

92. *Id.* at 1389.
93. *Id.* at 1391.

procedure provided in the implementing agreements of the UNCLOS would be substantially deprived. Based upon the aforementioned analysis, the Annex VII Arbitral Tribunal concluded that it lacks jurisdiction to entertain the merits of the dispute concerning the conservation and management of SBT stocks, brought by Australia and New Zealand against Japan. Having reached this conclusion, the Tribunal does not find it necessary to pass upon questions of the admissibility of the dispute. [94]

VII. IS IT POSSIBLE FOR TAIWAN AND OTHER CCSBT MEMBERS TO SEND DISPUTES TO ITLOS FOR JUDGMENT? DOES THE TRIBUNAL HAVE JURISDICTION?

A. Fishery Foreign Relations Between Taiwan and Other CCSBT Members

Taiwan and CCSBT members Japan, Australia, New Zealand and South Korea and CCSBT cooperating non-member Philippines have no formal diplomatic ties. However, in February 1999, Taiwan signed an Action Plan with Japan, and in April 2003 signed another related follow-up Action Plan for the purpose of proceeding to cooperation in handling the following matters: the buy-back and decommission of the used tuna longline fishing vessel sold by the Japanese companies to Taiwan's fishing companies or nationals, the re-registration of the Flag of Convenience (FOC) fishing vessels owned and operated by Taiwanese nationals, the management of the large-scale long-line fishing vessels, and the deterrence of illegal, unreported and unregulated (IUU) fishing activities. In addition, as noted previously, in April 2001, at the 7th Annual Meeting of the CCSBT, the Resolution to Establish an Extended Commission and An Extended Scientific Committee was adopted. On December 28, 2001, CCSBT Executive Secretary, Brian Macdonald, according to this Resolution, invited Taiwan as "the Fishing Entity of Taiwan" to apply to become a member of the Extended Commission. On August 30, 2002, Taiwan formally became a member of the CCSBT Extended Commission and Extended Scientific Committee. Afterwards, Taiwan participated in the CCSBT activities related to the conservation and management of SBT, and Taiwan's rights and obligations arising from the membership of this fisheries management organization are bound by the SBT Convention, the April 2001 CCSBT Resolution, other resolutions adopted or decisions made by the Commission, which include the national quotas of the yearly-decided TAC for SBT, the adoption and

94. *Id.*

implementation of the SBT conservation and management measures, and the dispute settlement procedure. The interactions between Taiwan and other CCSBT members with regard to conservation and management of SBT in accordance with the SBT Convention are also governed by these documents.

B. Relevant Treaties, Agreements, Arrangements, Diplomatic Notes, or Other Principles Under International Law That Bind Taiwan and Other CCSBT Members

As far as the fisheries resources conservation and management measures in the EEZ and high seas are concerned, Taiwan and other CCSBT members, based either on treaty obligation or voluntarily obedience, should be bound by the relevant international (treaty and customary) law, including the UN General Assembly Resolution 46-215 adopted in December 1991,[95] and other fisheries related international declarations, treaties, conventions or action plans, in particular the UNCLOS, the 1992 Agenda 21, the 1992 Cancun Declaration, the HSCA, the 1995 Code of Conduct for Responsible Fishing, the UNFSA, and the Action Plans passed by the Food and Agriculture Organization of the United Nations related to management of fishing capacity, incidental catch of sea birds by long-line fishing vessels, and the Illegal, Unreported, and Unregulated (IUU) fishing. At the same time, Taiwan and other CCSBT members also have obligations to respect the resolutions adopted or decisions made by the international or regional fisheries management organizations to which they belong.

The five members of CCSBT (Japan, Australia, New Zealand, South Korea and Taiwan), apart from Taiwan, are all parties to the UNCLOS and the SBT Convention; Japan, Australia and New Zealand are parties to the UNFSA; Australia, New Zealand, South Korea and Japan are parties to the HSCA. On the basis of the 2001 Exchange of Letters with the CCSBT, Taiwan is indirectly bound by the provisions provided in the SBT Convention. After Taiwan became a member to the CCSBT Extended Commission, there arose the possibility of disputes between

95. Ocean Law, United Nations General Assembly Resolution 46/215: Large Scale Pelagic Drift-Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas, http://www.oceanlaw.net/texts/ga46_215.htm (stating this resolution requests all nations from the end of 1992 to stop large-scale pelagic drift-net fishing in the open ocean. Large scale drift-net fishing and its impact on the living marine resources of the world's oceans and seas).

Taiwan and other CCSBT members, arising from conflicting interpretation or application of the related international treaties, arrangements, diplomatic Exchange of Notes, etc. Once a dispute occurs, Taiwan and the parties to the dispute are required to follow the dispute settlement procedures that are provided in the related treaties, resolutions, or diplomatic exchange of notes.

According to paragraph 2 of the April 2001 CCSBT Resolution, once any dispute arises between Taiwan and other CCSBT members concerning the interpretation or application of this Resolution, including the provisions of the SBT Convention explicitly specified in the Resolution, or the Exchange of Letters referred to in paragraph 6 of the April 2001 CCSBT Resolution, should be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.[96] While paragraph 2 of the April 2001 CCSBT Resolution, as previously mentioned, excludes judicial settlement as a means of dispute settlement, can it be argued that the inclusion of the text of "or other peaceful means agreed by the parties to the dispute" in this Resolution be interpreted as including ITLOS? There are scholars who believe that the wording "or other peaceful means agreed by the parties to the dispute" in the April 2001 CCSBT Resolution can be interpreted as including ITLOS.[97] Due to the fact that, the text of paragraph 2 of the April 2001 CCSBT Resolution includes the method of arbitration by independent third parties as one means of dispute settlement, it should therefore be reasonably interpreted that judicial settlement is also included as one of the means of dispute settlement.[98] However, to help clarify the real intention of the CCSBT that members not include the wording "judicial settlement" in the text of paragraph 2 of the Resolution, it might be useful to examine the records of the discussions and negotiations at the annual meeting of the CCSBT held in April 2001, provided that these records are available.

It is this writer's opinion that the intention to take the wording "judicial settlement" from the text of Paragraph 2 of the April 2001 Resolution was probably to avoid the difficulty of dealing with the sensitive issues concerning Taiwan's international legal status, diplomatic recognition of Taiwan, or the possibility of Taiwan's appealing to ICJ or other tribunals when a dispute arises between Taiwan and other CCSBT member states, which must be resolved in accordance with the dispute settlement procedure

96. April 2001 CCSBT Resolution, *supra* note 7, para. 2.

97. Letters between Ted L. McDorman, School of Law, University of Victoria, Canada and Editor-in-Chief of Ocean Development & International Law: The Journal of Marine Affairs and the author (on file with the author).

98. *Id.*

provided in Paragraph 2 of the April 2001 CCSBT Resolution. This speculation is problematic, however, because Taiwan is not a member of the United Nations and cannot submit a dispute to the ICJ for judicial settlement. In addition, ITLOS does not exclude ruling over a dispute involving "entities other than States Parties." Of the three founding members of the CCSBT, Japan possibly has a stronger preference to avoid dealing with the issue concerning Taiwan's international legal standing or to consider sensitive issues such as diplomatic recognition during the proceedings of dispute settlement involving Taiwan. As for Australia and New Zealand, it is not clear what kind of position they took when the April 2001 CCSBT Resolution was drafted, discussed, and then adopted. Unlike these two countries, when the CCSBT adopted the Resolution, Japan made a special declaration, stating that the Exchange of Letters specified in the text of paragraph 6 the Resolution was not the same as diplomatic documents.[99] Australia and New Zealand did not make similar declarations. Once a CCSBT member, such as Japan, believes that the text of Paragraph 2 of the April 2001 CCSBT Resolution related to dispute settlement resolution does not include judicial settlement, and another CCSBT member (such as New Zealand) or an Extended Commission member (such as Taiwan) takes the view that the wording "or other peaceful means agreed by the parties to the dispute" in the Resolution also includes submitting the dispute to ITLOS for settlement, the two parties must again return to basic procedures for dispute resolution. In addition, it is worth mentioning that Paragraph 2 of the Resolution to Establish an Extended Commission and Extended Scientific Committee clearly stipulates that arbitration is one of the peaceful means of dispute settlement to be used in disputes between Taiwan and CCSBT members when a dispute between them occurs over the interpretation and application of the April 2001 CCSBT Resolution and the relevant provisions of the SBT Convention. In any case, comparing the selection of the method of arbitration with the choice of submitting the dispute to ITLOS for judgment, the possibility for China to request to intervene in a case submitted to ITLOS by Taiwan and another party to a dispute is much bigger than the selection of the method of arbitration, in which the third party (China) is unable to intervene.

99. *See* Commission for the Conservation of Southern Bluefin Tuna, Report of the Seventh Annual Meeting of the Commission, *supra* note 31.

C. The Possibility of Referring Disputes to ITLOS for Judgment and the Issue of Whether ITLOS has Jurisdiction

The legal disputes between Taiwan and other CCSBT member states that might arise from the arguments over the following matters: the SBT conservation and management measures in accordance with the SBT Convention, Taiwan's right to participate in the operation and decision-making process of the CCSBT, and Taiwan's right in those scientific or technical working groups or subsidiary bodies established under the Commission. For example, after the CCSBT Extended Commission made a decision, the CCSBT adopted another new resolution overturning or making substantial revisions to the decision made previously by the CCSBT Extended Commission. Another example is that the CCSBT adopted a resolution that revised the yearly TAC of SBT, which increased the amount of TAC. However, when distributing national quotas, all CCSBT members except Taiwan increased their national quotas. Other possible legal disputes include the issue of the legal standing of the 2001 Exchange of Letters between the CCSBT Executive Secretary and Taiwan's Fisheries Administrator. Is this Exchange of Letters considered "any other agreement" as specified in Article 20(2) and Article 21 of the ITLOS Statute? Do CCSBT members have the obligation to refer any of their disputes with Taiwan, which arise from the interpretation and application of the SBT Convention, the April 2001 CCSBT Resolution, and the December 2001 Exchange of Letters between Taiwan's Fisheries Administrator and the CCSBT Executive Secretary, for arbitration? Or, in accordance with the April 2001 CCSBT Resolution, can CCSBT members sign a special agreement with Taiwan for disputes to be referred to ITLOS for judgment?

As explained in Section III, if any dispute occurs between Taiwan and CCSBT members that relates to the interpretation or application of the SBT Convention, the April 2001 CCSBT Resolution, and the 2001 Exchange of Letters between Taiwan and the CCSBT Executive Secretary, the main legal basis for dispute resolution is the text of paragraph 2 of the April 2001 CCSBT Resolution, namely "[a]ny dispute concerning the interpretation or implementation of this Resolution, including the articles of the Convention specified in the Resolution, or Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute." Accordingly, for ITLOS to have jurisdiction over disputes involving Taiwan and arising from the interpretation and implementation of the SBT Convention, the following conditions must be satisfied:

1) If a dispute already exists, and there is no way for resolution through negotiation or other peaceful means;
2) The dispute must be related to Taiwan's participation in the CCSBT activities based on its rights and obligations under the SBT Convention;
3) The interpretation of the Resolution adopted by the CCSBT in April 2001 and the Exchange of Letters between Taiwan and the CCSBT includes the choice of referring the dispute to ITLOS for resolution;
4) A special agreement concluded between Taiwan and other CCSBT member states, agreeing to refer their disputes to ITLOS for judicial settlement.

Now, assuming that the CCSBT sets the TAC for SBT, according to an independent scientific report and the proposal it submitted to the Commission, at 17,930 mt in 2006-2007, including 7,065 mt allocated to Japan, 6,265 mt allocated to Australia, 1,940 mt allocated to South Korea, 1,140 mt allocated to Taiwan, and 620 mt allocated to New Zealand. The remaining 900 mt would be allocated to cooperating non-members Philippines, Indonesia and South Africa. However the allocated quota for these countries is inconsistent with the previous decision made by the CCSBT Extended Commission, according to which, for the TAC of 17,930 mt of SBT for 2006-2007, 6,965 mt is allocated to Japan, 6,165 mt is allocated to Australia, 1,640 mt is allocated to South Korea, 1,640 mt is given to Extended Commission Member Taiwan, 620 mt is given to New Zealand. The remaining 900 mt is divided between cooperating non-members Philippines, Indonesia and South Africa. Because Taiwan believes that the allocated quota for CCSBT States contravenes the April 2001 CCSBT Resolution, as well as principles of justice, equality, and good faith that are specified in the Exchange of Letters between the CCSBT Executive Secretary and Taiwan, and also deprives of Taiwan's rights, it has gone through much negotiation but is still unable to reach agreement over resuming previous decisions regarding the national quota distribution for Extended Commission Members. Therefore, Taiwan unilaterally declared that it decides to increase the TAC of the 2006-2007 SBT from 1,140 mt to 1,640 mt and authorizes its fishing boats to increase their catches. Afterwards, Taiwan requires settlement of the dispute under paragraph 2 of the April 2001 CCSBT Resolution.

When requesting to resolve the above hypothetical dispute with CCSBT members, Taiwan might encounter the following situations:

1) CCSBT members agree with Taiwan's request to refer the dispute for arbitration;
2) CCSBT members do not agree to refer the dispute for arbitration;
3) CCSBT members agree with Taiwan's request for seeking settlement of the dispute in accordance with the peaceful means agreed to by the parties to the dispute; this includes the means of judicial settlement; because Taiwan is not a party to the ICJ Statute, and not a party to the 1982 UNCLOS, thus possible adoption of judicial resolution is through ITLOS; this agreement must be embodied in a special agreement signed by both Taiwan and CCSBT members that are parties to the dispute;
4) CCSBT members do not agree to use the method of judicial settlement.

When referring to the dispute for arbitration, it is possible to avoid a third party intervention, and thus, when CCSBT members agree to Taiwan's request to refer disputes for arbitration, it is more difficult for China to intervene if it makes the request in the arbitration case. However, if CCSBT members agree when Taiwan's request to refer the dispute to ITLOS for settlement, it thus becomes more likely for the issue of third party intervention to occur.

The following discussions will focus on the questions concerning whether ITLOS has jurisdiction over the above-mentioned hypothetical disputes and whether the Tribunal can prescribe provisional measures in accordance with the relevant international legal regulations, the issue related to the request for intervention from a third party in the proceedings, and the issue of prompt release of vessels and crews.

1. CCSBT Members Agree with Taiwan's Request to Refer Disputes to Arbitration

When a dispute occurs related to the above-mentioned arguments between Taiwan and CCSBT members, both parties should settle their disputes according to the methods of dispute settlement specified in paragraph 2 of the April 2001 CCSBT Resolution, which includes referral to arbitration. Because both sides to the dispute already have reached an agreement when the Resolution was adopted and the diplomatic notes were exchanged, there exists a legal base for referring to arbitration. However possible problems are: whether this arbitration includes the Permanent

Court of Arbitration stipulated in Annex 1 of the Convention for the Conservation and Management of the Highly Migratory Species in the Western and Central Pacific, the Arbitral Tribunal constituted in accordance with Annex VII of the 1982 UNCLOS, or does it mean general arbitral tribunal only? If it is referred to the Permanent Court of Arbitration or the Annex VII Arbitral Tribunal of the UNCLOS, do Taiwan and CCSBT members have the right, based on Article 290, paragraph 1 of paragraph 5, of the UNCLOS, to request the prescription of provisional measures in the case?

To answer the aforementioned questions, in the first place, it should be noted that the five existing members of the CCSBT Extended Commission, excluding Taiwan, have all ratified the UNCLOS, and are contracting parties to this Convention. However, only Australia in 2002 has made a declaration choosing dispute settlement methods in accordance with Article 287 of the UNCLOS; and Taiwan is still not a party to the UNCLOS because of political factors involved. When a dispute arises regarding the interpretation or implementation of the SBT Convention and the April 2001 CCSBT Resolution, it must go through arbitration according to Article 287(4) of the UNCLOS, which provides that "[i]f the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree." However if Taiwan interprets paragraph 2 of the April 2001 CCSBT Resolution regarding dispute settlement methods to include referral to ITLOS, and other CCSBT members do not believe it includes ITLOS and insist on referral to arbitration, a dispute thus arises. In this kind of dispute, Article 287(5) of the UNCLOS provides: "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree." And Article 291 of the UNCLOS explicitly provides that "[t]he dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention." Moreover, Article 13 of Annex VII of UNCLOS reads: "The provisions of this Annex shall apply *mutatis mutandis* to any dispute involving entities other than States Parties." Thus, even though Taiwan is not a party to the UNCLOS, the arbitration regulations provided in the Annex VII and Annex VI of the UNCLOS also apply to disputes arising between Taiwan and CCSBT members. The disputes concerning the right of Taiwan to participate in the CCSBT activities

related to SBT conservation and management, the duty of other CCSBT members to cooperate with Taiwan, and the right and interest of Taiwan to be allocated, without any discrimination, the national quotas of the TAC of SBT as yearly decided by the Commission, are all closely related to the objective of adopting the UNCLOS, and the relevant provisions of the UNFSA. Thus, after a dispute occurs between Taiwan and other CCSBT member states, is thereafter submitted to the Permanent Court of Arbitration, and this Court considers that it has *prima facie* jurisdiction according to Part XV of the UNCLOS, the Permanent Court of Arbitration, before making a final ruling, may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.

Alternatively, after a dispute occurs between Taiwan and other CCSBT members, which is submitted for arbitration, and before the composition of the arbitral court or tribunal, any courts (the Permanent Court of Arbitration or ITLOS) agreed to by the parties to the dispute, if failing to come to agreement within two weeks from the date of the request for provisional measures, and if it is considered that the arbitral tribunal which is to be constituted would have *prima facie* jurisdiction, and that the urgency of the situation so requires, ITLOS can prescribe provisional measures according to Article 290 of the UNCLOS. Once the arbitral court or tribunal, which is to rule on the dispute between Taiwan and other CCSBT member states, is constituted, it may modify, revoke or affirm the provisional measures prescribed previously in accordance with Article 290, paragraphs 1 to 4, of the UNCLOS. In addition, based on the fact that Taiwan is not a party to 1982 UNCLOS, the judicial practice of the Annex VII Arbitration Tribunal in the *Southern Bluefin Tuna* Case (Jurisdiction and Admissibility), and the lack of an agreement that can be applied to the dispute between Taiwan and CCSBT members for using the compulsory dispute procedure, it is unlikely to adopt the mandatory dispute settlement procedure when a dispute occurs between Taiwan and other CCSBT member states.

2. CCSBT Members are not Willing to Refer Disputes for Arbitration

In the event of a dispute arising between Taiwan and CCSBT members related to the above-mentioned hypothetical situation, the two sides to the dispute should follow the dispute resolution methods provided in paragraph 2 the April 2001 CCSBT Resolution to settle their differences, including referral to arbitration. Once Taiwan requests such arbitration, but the CCSBT members of the parties to the dispute refuse Taiwan's proposal for arbitration, then the CCSBT member states who are parties

to the dispute would have contravened the regulation of dispute settlement provided in the April 2001 CCSBT Resolution.

3. CCSBT Members Agree to Adopt Judicial Settlement Methods

In the event of a dispute arising between Taiwan and CCSBT members related to the above-mentioned hypothetical arguments, and the two sides of the dispute are to settle the dispute in accordance with the procedure specified in paragraph 2 of the April 2001 CCSBT Resolution, is there a possibility to refer the dispute to ITLOS or the ICJ for judicial settlement? As noted earlier, Taiwan is not a member of the United Nations, not a party to the ICJ Statute, and also not a party to the UNCLOS. Thus it is unlikely to refer the dispute to the ICJ for resolution. However, if the disputing parties of Taiwan and CCSBT members agree to refer their disputes to ITLOS according to the wording "or other peaceful means agreed by the Parties to the dispute" contained in paragraph 2 of the April 2001 CCSBT Resolution, then, according to the direct application and interpretation of the legal clause, this method of judicial settlement for resolving a dispute between Taiwan and other CCSBT member states is possible. Under these circumstances, ITLOS should have jurisdiction over this case.

4. CCSBT Members Do Not Agree to Adopt Methods of Judicial Settlement

In a case where a dispute arises between Taiwan and CCSBT members, and the CCSBT members who are parties to the dispute do not agree to adopt methods of judicial settlement, Taiwan has no means to change the CCSBT member states' decision, mainly because under paragraph 2 of the April 2001 CCSBT Resolution, apart from negotiation, inquiry, mediation, conciliation and arbitration, the parties to the dispute must agree to adopt peaceful means of judicial settlement, that includes referral to ITLOS.

5. The Request of a Third-Party for Intervention

In the event that a dispute occurs between Taiwan and CCSBT members, and the two sides of the dispute agree to adopt the means of judicial settlement, namely referral to ITLOS for judgment, then, according to Article 31(1) of the ITLOS Statute, which reads: "[s]hould a State Party

consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene." Whether the request of a third party for intervention in the case is permitted is decided by ITLOS. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute should be binding upon the intervening state party in so far as it relates to matters in respect of which that state party requests to intervene.[100] In addition, according to Article 32(2) of the ITLOS Statute, no matter when, if according to Article 21 or 22 of the Annex VII of UNCLOS, there arises doubt about the interpretation or application of an international agreement in question, the Registrar of the ITLOS must notify all of the state parties to that agreement. Article 32(3) of this same Statute also provides that: "[e]very party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it."

Therefore once Taiwan and a CCSBT member, who are parties to a dispute, conclude a special agreement, agreeing to refer their dispute to ITLOS for settlement, it is possible for China to submit a request for intervention in the case in accordance with Articles 31 and 32 of the ITLOS Statute. However, Professor Bernard H. Oxman believes that, according to Articles 20 and 21 of the ITLOS Statute, if: (1) a dispute occurs between Taiwan and another country, which involves the interpretation or implementation of an agreement that is concluded between states and Taiwan or between international governmental organisations and Taiwan; (2) the above-mentioned agreement that binds Taiwan's participation in the international organization concerned correlates with the management objectives of the UNCLOS; and 3) this agreement gives ITLOS jurisdiction over the dispute. Under the aforementioned circumstances, the regulations provided in the UNCLOS clearly give ITLOS jurisdiction over entities other than state parties. Therefore, the exercise of the jurisdiction by ITLOS over the case involving Taiwan "would not depend on, and would neither confirm nor prejudice, any underlying juridical or political position regarding the present or future international status or competence of Taiwan."[101] This opinion means, according to the text of the 1982 UNCLOS, that ITLOS, other governments, or other third parties that are interested in the case involving Taiwan, will not be forced to deal with those fundamental

100. *See* ITLOS, *supra* note 1, art. 13(2)(3).

101. Bernard H. Oxman, Does the International Tribunal for the Law of the Sea Have Jurisdiction over Disputes with Taiwan? 16 (Dec. 10, 2004) (unpublished manuscript, presented at International Symposium on the Law of the Sea and Taiwan, on file with author).

legal or political issues in relation to Taiwan's international legal standing or competence under international law before turning to the question of whether ITLOS can exercise jurisdiction over the dispute involving Taiwan in accordance with Article 20, paragraph 2, and Article 21 of the ITLOS Statute. Professor Oxman further points out that the aforementioned opinion does not mean that those parties (such as China) with strongly held opinions or high interest in the dispute involving Taiwan and the question concerning whether ITLOS has jurisdiction over the dispute would remain silent on the issue of Taiwan's legal status in this context. But it is quite another matter to suppose that the sensitive issue concerning Taiwan would be raised by ITLOS itself *proprio motu*, or by a party to the dispute, or by a third party that requests for intervention pursuant to Article 31 or 32 of the ITLOS Statute. And even if this issue were raised, Professor Oxman argues, "it is also not clear that the Tribunal would address it, let alone decide it."[102] Professor Oxman suspects that many people believe that ITLOS should address the fundamental legal or political questions related to Taiwan's international status and competence.[103]

Now, if a dispute arises between Taiwan and a WCPFC member regarding the interpretation or implementation of the Convention for the Conservation and Management of the Highly Migratory Species the Western and Central Pacific, although according to Annex 1 of the Convention, disputes should be referred to the Permanent Court of Arbitration for settlement, however the provisions provided in Annex I does not exclude Taiwan and another WCPFC member from reaching another agreement for the purpose of resolving the dispute. For example, it is possible for Taiwan to sign a special agreement with the Solomon Islands and the Marshall Islands, with which it has diplomatic relations, regarding the referral of disputes to ITLOS for settlement. Can China then request intervention in the said dispute pursuant to Articles 31 or 32 of the ITLOS Stature? Under these circumstances, according to Articles 20, paragraph 2, and Article 21 of the ITLOS Statute, ITLOS has jurisdiction over the said dispute, and at the same time the rejection of China's request for intervention by ITLOS is highly possible.

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102. *Id.* at 17.
103. *Id.*

6. The Jurisdiction of ITLOS over Requests for Prompt Release of Crews and Vessels

As pointed out in Section IV of this paper, according to Article 292(1) of the UNCLOS, ITLOS has jurisdiction over disputes concerning the detention and prompt release of fishing vessels. If Taiwan's Coast Guard Administration detains a vessel flying the Japanese flag within the Taiwanese EEZ, and according to the Japanese claim, that Taiwan fails to release promptly the detained Japanese vessel and its crew members in accordance with the regulations provided for in the UNCLOS after posting a reasonable bond or other financial security by the Japanese owners of the detained vessel, could Japan submit a request to ITLOS, ordering Taiwan to promptly release the detained vessel because Japan and Taiwan were not able to reach an agreement regarding the prompt release of the detained vessel and crew members within ten days from the time of detention and the lack of any other agreements? The answer to this hypothetical question should be negative. As Article 292(1) of the UNCLOS applies to states parties to the Convention, the detaining country of Taiwan is not a party to the UNCLOS, and therefore ITLOS should not have jurisdiction over the case.

However, if the detained vessel is flying the flag of the Marshall Islands, but the ship owner or shipping company is Taiwanese, the sea area in which it is detained is the EEZ of Japan, and Japan is the detaining country, then does ITLOS have jurisdiction over the request for prompt release of this vessel and its crew members? This hypothetical situation is further explained as follows: A vessel is registered under the flag of the Marshall Islands, but owned or operated by Taiwanese fishing company as a FOC vessel. The vessel is found fishing in the EEZ of Japan and is therefore detained by the Japanese authority. However, after posting a reasonable bond or other financial security, Japan fails to release promptly the detained vessel and its crew members within ten days from the time of detention in accordance with the relevant regulations provided for in the UNCLOS. In a further hypothesis, if Japan and the Marshall Islands both fail to reach agreement regarding the prompt release of the vessel and its crew members within ten days from the time of detention of this ship and both sides do not have any other agreements then, according to Article 292, paragraphs 1 and 2, of the UNCLOS, which provides that "[t]he application for release may be made only by or on behalf of the flag State of the vessel," the Marshall Islands is entitled to make a request to ITLOS for prompt release of vessels and its crews because the Marshall Islands is also a contracting party to the UNCLOS. As for Taiwan and Japan, whether Japan may

reach another agreement with the Marshall Islands, and whether the Marshall Islands is willing to submit its request for the prompt release of a vessel and its crew members to ITLOS, these are other issues. In actuality, according to Article 280 of the UNCLOS, Japan and the Marshall Islands can at any time settle a dispute between them concerning the interpretation or application of the UNCLOS by any peaceful means of their own choice, and this includes the application of Article 292 of the UNCLOS, as well as choosing ITLOS as the judicial body to resolve the dispute.

VIII. CONCLUSION

In accordance with the provisions of the UNCLOS, and Articles 20(2) and 21 of the ITLOS Statute, the Tribunal is indeed open to entities other than States Parties to the UNCLOS, which should include Taiwan regarded as a fishing entity. It can be argued that based on a broader interpretation of the wording "any other agreement' contained in Articles 20(2) and 21 of the ITLOS Statute, the April 2001 CCSBT Resolution and the Exchange of Letters inviting Taiwan to apply to become a member of the CCSBT Extended Commission and Extended Scientific Committee done in December 2001 should be treated as such "any other agreement." Due to the fact that the diplomatic exchange of notes between the government of Taiwan and CCSBT must complete the required domestic legal procedures in order to become effective, namely obtaining the consent from the Taiwanese legislature and signed by its President, this Exchange of Letters should be consider an effective legal document exchanged by Taiwan and an international governmental fishery management organization, namely the CCSBT. Even so interpreted, if ITLOS is to exercise jurisdiction over a dispute submitted to it by the disputing parties of Taiwan and other CCSBT member states or other members of the CCSBT Extended Commission over the interpretation and application of the SBT Convention, the April 2001 CCSBT Resolution, and the SBT conservation or management measures decided by the Commission for settlement, it must be answered in positive regarding the question whether the wording "or other peaceful means agreed by the parties to the dispute" contained in paragraph 2 of the April 2001 CCSBT Resolution also include the means of judicial settlement. Because Taiwan is not a member of the United Nations, and is not a contracting party to the ICJ Statute, if the disputing parties of Taiwan and a CCSBT member or Extended Commission member agree

to refer the dispute for judicial settlement, there is a greater possibility to refer the dispute to ITLOS for settlement. But to return to the crux of the matter, if ITLOS is to exercise jurisdiction over this dispute, it must be that Taiwan and a CCSBT member both agree to refer their dispute to ITLOS for trial. This required a special agreement concluded by both sides to the dispute. However given the fact that Japan made a declaration in April 2001 when the Resolution to Establish an Extended Committee and Extended Scientific Committee was adopted, which interpreted the Exchange of Letters between Taiwan and the CCSBT as not an exchange of diplomatic documents,[104] it is more likely to see Japan adopt a much narrower or stricter position in interpreting and implementing the April 2001 CCSBT Resolution than that of Australia or New Zealand. But no matter how the disputing parties of Taiwan and a CCSBT member or an Extended Commission member agree to refer their disputes to ITLOS for trial, there is no doubt that ITLOS has jurisdiction over the dispute pursuant to Articles 280 and 291 of the UNCLOS, and Articles 20(2) and 21 of the ITLOS Statute.

In addition, if ITLOS is to exercise jurisdiction over a dispute between Taiwan and CCSBT members or Extended Committee members arising from the interpretation and implementation of the SBT Convention, the April 2001 CCSBT Resolution, and the CCSBT conservation and management measures, it is also possible to rely on Article 22 of the ITLOS Statute. That is, ITLOS has jurisdiction over the dispute mainly because the contracting parties of Japan, Australia, New Zealand and South Korea agree to refer the dispute to ITLOS for settlement, and Taiwan also does not object. Although based entirely on the legal interpretation of the relevant provisions or regulations, it can be established that the dispute between Taiwan and other CCSBT members or CCSBT Extended Commission members can be referred to ITLOS in accordance with Article 22 of the ITLOS Statute for resolution, in actual operation, due to political considerations, whether Japan, Australia, New Zealand and South Korea really agree to refer disputes involving Taiwan to ITLOS for trial will be not so easy to overcome.

Finally, once China makes a request for intervention in a dispute between Taiwan and other CCSBT member states in accordance with Articles 31 or 32 of the ITLOS Statute, according to the opinion of some foreign international legal scholars and this author, the possibility of accepting the Chinese request for third party intervention by ITLOS is not great. Due to the fact that Taiwan was invited as a fishing entity to become a member of the CCSBT Extended Commission and Extended

104. *See* Commission for the Conservation of Southern Bluefin Tuna, Report of the Seventh Annual Meeting of the Commission, *supra* note 31.

Scientific Committee, and together with the application of the April 2001 CCSBT Resolution and the Exchange of Letters between Taiwan and the CCSBT, as well as an agreement having been reached between the disputing parties of Taiwan and other CCSBT members or CCSBT Extended Commission members to refer their disputes to ITLOS for settlement, it is not likely for ITLOS to agree to consider simultaneously the legal and political issues related to Taiwan's international legal standing when the Tribunal is dealing with the case. Therefore, it is very much likely that ITLOS will reject China's request for a third party intervention pursuant to Articles 31 and 32 of the ITLOS Statute.